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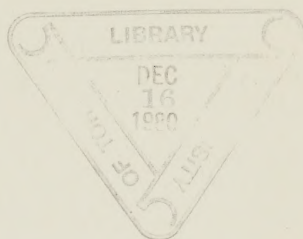
DISCUSSION PAPER  
ON THE  
DRAFT CONSTRUCTION LIEN ACT

MINISTRY OF THE ATTORNEY GENERAL  
NOVEMBER, 1980



Ministry of the  
Attorney  
General

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## FOREWORD

This Discussion Paper was written in response to numerous requests from the construction industry for both major and minor amendments to *The Mechanics' Lien Act*. The Draft Construction Lien Act contained in the Discussion Paper is designed to replace *The Mechanics' Lien Act*.

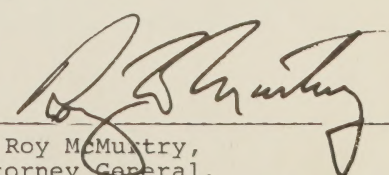
The Draft Construction Lien Act attempts to accomplish three objectives. First, it is intended to make the major revisions to the lien legislation about which consensus has been achieved within the construction industry. Second, it presents for consideration a number of modifications intended to improve the operation of the lien legislation. The third objective has been to completely restructure and rewrite the lien legislation with a view to making it more comprehensive and accessible to those whose security depends upon it and to those whose actions and obligations are determined by it.

The Discussion Paper is composed of two Parts. Part I discusses the reasons for lien legislation, the background to the Draft Act and consumer home improvements. It also contains a summary of the specific proposals embodied in the Draft Act. Part II consists of the Draft Construction Lien Act. This Part is in chart form, providing the Draft, a section-by-section explanation and the corresponding provisions of the existing *Mechanics' Lien Act*.

Most of the problems of the construction industry cannot be solved by legislation. However, the Draft Act is the Ministry's attempt to devise legislation that will provide security without unnecessarily impeding the flow of capital within the construction industry.

The Draft Construction Lien Act is intended to serve as a model for discussion. It is not engraved in stone. I will welcome any suggestions that interested individuals or groups may have for improving the proposed legislation. In addition, I have established an Advisory Committee of experts in the field of construction liens to review the Draft Act and the suggestions received from the public. Comments made by the public and by the Advisory Committee will be of great assistance in preparing a Bill for introduction in the Legislature.

Comments, briefs and suggestions should be sent by February 28, 1981, to the Policy Development Division, Ministry of the Attorney General, 17th Floor, 18 King Street East, Toronto, Ontario, M5C 1C5.

  
\_\_\_\_\_  
R. Roy McMurtry,  
Attorney General.







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## PART I

### The Reasons For Lien Legislation

The demand for special protection for the suppliers of services and materials to the improvement of land has grown out of the complicated nature of the construction industry and the perceived inadequacy of ordinary contractual remedies.

Every construction project involves several tiers of contractual relations. A construction project may be viewed as a pyramid. The owner stands at the apex of this pyramid. He hires the main contractor. The contractor, in turn, engages the services of a number of subcontractors. Each of these may hire further subcontractors, all of whom will be responsible for specialized aspects of the project. At each step the base of the pyramid is broadened, as the number of persons supplying services or materials to the improvement increases.

This pyramid results in a complex web of relationships. Each person arranges for the supply of specific services or materials to the improvement, knowing that those services and materials will actually be supplied by persons other than the person with whom he deals. Conversely, each person looks to those with whom he has an agreement for payment, knowing that money for that payment must come from someone further up the pyramid. A supplier of services or materials in a construction project may be greatly affected by the behaviour of many people with whom he has no contractual relationship. A bankruptcy or default of one individual upon a contract, or subcontract, can have ruinous effect on an entire building project.

Ordinary contractual remedies appear ineffective to deal with this web of relationships. If an owner refuses to pay for the work that has been done on his premises, those at the bottom of the construction pyramid who, in fact, have done most of the work, have no contractual claim against the owner. The lien legislation is designed to provide remedies where the old remedies of contract law are insufficient.

Thus, the major reason for creating lien legislation is to provide remedies for the suppliers of services and materials that go beyond contractual rights. Lien legislation has been the Legislature's attempt to deal with the complex web of relationships in the industry. It has been an attempt to prevent the total destruction of the web when parts of it fail.



The legislation creates two statutory types of rights — lien rights and trust rights. The lien is a right over the owner's premises in favour of persons who supply services and materials to improve the owner's premises. The owner can protect himself from having his property sold to pay claims by following the proper payment procedure set out in the Act. The trust rights give some protection to suppliers of services and materials primarily in cases where an owner, contractor or subcontractor becomes insolvent or bankrupt.

Another major reason advanced for retaining lien legislation relates to the financing of the industry. The building industry is highly dependent upon credit. The protections afforded by *The Mechanics' Lien Act* have now become an integral factor in the provision of credit to that industry. The Act ensures that credit will be made available, despite the undercapitalization of many firms engaged in the construction industry and the high rate of insolvency in that industry.

For these reasons, there is virtual unanimity within the construction industry that continuation of the protections afforded by *The Mechanics' Lien Act* is essential to the health of the industry. At the same time, however, there is a general consensus within the industry that the present operation of the Act is unsatisfactory and that this area of the law is ripe for reform.

## Background To The Draft Construction Lien Act

The rights given to constructors under *The Mechanics' Lien Act* are entirely creatures of statute. The common law, or judge-made law, provided no similar rights. In 1791 the State of Maryland became the first common law jurisdiction to enact legislation providing for a construction lien. Other legislation has now been enacted in almost every North American jurisdiction. In 1873, Ontario became the first Canadian jurisdiction to enact legislation providing for a construction lien.

Since *The Mechanics' Lien Act* was first enacted, Ontario has evolved from a largely agricultural society to a heavily industrial one. During this period, *The Mechanics' Lien Act* has undergone major amendment on an average of once every twelve years. New ideas have been grafted onto the old. For example, the basic lien provision was first enacted in 1873, but the trust provisions were not added to the Act until 1942. Significant changes have also been made to many of the key concepts contained in the Act since they were first introduced. Although the Act was revised in 1969, upon the recommendation of the Ontario Law Reform Commission, some of the benefits that were hoped for from that revision have not materialized. In addition, new problems have arisen. In recent years, there have been an increasing number of complaints made about the operation of the Act.

In 1973 and again in 1978, the Council of Ontario Contractors Associations (C.O.C.A.), the associations representing architects and professional engineers, and the Construction Industry Credit Bureau Division of Creditel, acting jointly, requested that significant amendments be made to *The Mechanics' Lien Act* in order to clarify rights and obligations and to rectify inequities under the Act. The Ministry of the Attorney General was consulted frequently during the development of the 1978 proposals. Since that time, officials within the Ministry have met and consulted frequently with representatives from such groups as: major contracting firms; builders in the commercial, industrial and residential sectors; trade unions; trade councils; major subcontractors; road, sewer and watermain constructors; architects and engineers. Significant representation has also been received from numerous lawyers specializing in the field of mechanics' lien law. As the list of requested changes grew, it became clear that mere amendment of the existing *Mechanics' Lien Act* would be inadequate to effect the major changes requested by the industry. Moreover, discussions with persons



in various segments of the industry revealed that there were major discrepancies in the way that the Act was being interpreted. As a result of a century of major and minor amendments, the Act has become incomprehensible. The incomprehensibility of the Act to those who are required to deal with it indicates that the Act is not as useful a tool of the industry as it might be.

The concern of the Ministry of the Attorney General is not merely academic. Mechanics' liens is one of the most litigated areas of the law. At any given time, tens of millions of dollars are tied up in court as a result of mechanics' lien litigation. Much of this litigation seems to result from conflicting interpretations of *The Mechanics' Lien Act*.

In its 1966 Report on *The Mechanics' Lien Act*, the Ontario Law Reform Commission expressed the need for substantially rewriting the Act. Although the Commission's specific recommendations for amendment were implemented in 1969, the Act has not been rewritten. In its present form, the Act is unapproachable by laymen, uninformative to the industry and repugnant to most lawyers. The Ministry of the Attorney General came to the conclusion that it should be rewritten.

The Draft Construction Lien Act set out in this Discussion Paper is a step towards the rewriting of the law of mechanics' liens. Because of the complicated nature of the relations with which it must deal, any statute pertaining to construction liens is bound to be complex. However, a complex subject need not be incomprehensible. Thus, one major objective behind the preparation of the Draft Act has been a desire to produce a more straightforward, comprehensible piece of legislation, written in a style as simple as the subject will allow.



### Consumer Home Improvements

The impact of construction lien legislation is most significant in the commercial, industrial and residential development sections of the building industry. However, private individuals building or renovating their homes also fall within the scope of the Act if they hire someone to work upon their property. The application of the Act to such consumer home improvements has been a cause of some concern to the Ministry. It is said that homeowners rarely comply with the legislation. This failure is attributable both to their ignorance of the law and also to the fact that they may have difficulty in getting contractors to work upon their premises if they maintain the holdback required by the Act. Thus, some suggestion has been made that the Act should not apply to consumer home improvements.

For a number of reasons, the Ministry has come to the tentative decision that consumer home improvements should not be exempt from the Act. If one agrees with the view that an owner should be liable to persons who have supplied services or materials to the improvement of his premises if he fails to pay for an improvement made to it, then it is difficult to justify the exception of a class of owners from such liability. The suppliers of services and materials to the home improvement market are particularly vulnerable financially, because they are small businesses without financial reserves. Furthermore, the effort to exempt such improvements from the scope of the Act would inevitably result in the drawing of arbitrary distinctions regarding the supply of similar types of services and materials.

However, there are certain features of the Draft Act that, if implemented, would reduce the impact of lien legislation on consumer home improvements. The requirement to pay the holdback into a joint trust account does not apply in the case of improvements where the value of the work to be done does not exceed \$150,000. It would, therefore, not apply to home improvements. The percentage to be held back by an owner would be reduced from the 15% he is now required to withhold, to 10% of the money due to the contractor. This would mean that if an owner did not retain the required holdback his maximum liability would be 10% of the contract price.

Summary of Specific Proposals Embodied in the Draft  
Construction Lien Act

1. THE HOLDBACK RATE UNDER THE DRAFT ACT WOULD BE 10% OF MONEY DUE, INSTEAD OF THE 15% RATE CONTAINED IN THE MECHANICS' LIEN ACT.

At present, *The Mechanics' Lien Act* requires an owner to withhold from payment 15% of the value of all work done on a construction contract during the period in which a lien may be preserved. The Draft Act would reduce the rate of holdback to 10%. This reduction continues a trend which began in the 1960s. Prior to the revision of the Act in 1969, a holdback of 20% was required on contracts where the value of work to be done was less than \$25,000, and 15% when the contract exceeded that amount.

Traditionally, the holdback rate has been set at the prevailing margin of profit within the construction industry. Where the holdback relates to the profit, the contractor and subcontractor receive enough payment to satisfy their obligations to those who supply services or materials under agreement with them. The current rate of profit in the construction industry is no longer near 15%. It now runs closer to 5%. Thus, a contractor or subcontractor from whom a holdback has been retained must often borrow money in order to pay for the services or materials which have been supplied to him. This borrowing increases the possibility of insolvency by a contractor or subcontractor. Insolvency of a contractor or major subcontractor imperils the completion of a project and the real security of everyone involved. Thus, the holdback, though designed to provide security to the suppliers of services and materials, can endanger that security if it is set too high.

Reduction of the holdback to the actual levels of profit, approximately 5%, would mean its virtual elimination. This would not be acceptable to most segments of the industry. Both the Nova Scotia Law Reform Commission and the Manitoba Law Reform Commission have recommended that the rate of holdback be reduced to 10%. The 10% figure seems to be a more reasonable rate of holdback, and has been incorporated into the Draft Act.

2. THE DRAFT ACT WOULD PREVENT PEOPLE FROM CONTRACTING AWAY THEIR RIGHTS UNDER THE ACT.

*The Mechanics' Lien Act* permits all persons having a lien, other than a workman earning less than \$50 a day, to waive their rights under the Act. Since there are few construction workers who earn less than \$50, this means that almost everyone may contract away his rights. Although this provision was designed to facilitate other forms of security, it has become a trap for the unwary and innocent.

In certain segments of the industry, it has become standard practice to insert a waiver clause into all contracts. Experienced contractors and subcontractors, who understand the meaning of the clause, will look for this provision and strike it out before signing the contract. Unfortunately, less experienced persons who are most in need of the protection afforded by the lien provisions of the Act often sign away their rights. For this reason, the Draft Act renders void any clause in a contract or subcontract providing for the waiver of any rights under the Act.

3. THE DRAFT ACT WOULD CLARIFY THE NATURE OF THE TRUST PROVISIONS

*The Mechanics' Lien Act* contains a number of provisions which impose separate trust obligations upon owners, contractors and subcontractors. The trust provisions are designed to ensure that all persons who are owed money by these people are paid. A person who misappropriates trust monies, or who fails to take reasonable steps to safeguard the interests of the beneficiaries of the trust, is liable to any beneficiary who suffers damage as a result. While there is great support within the industry for the basic idea of having trust obligations, there is great dissatisfaction with existing provisions of *The Mechanics' Lien Act*. The existing Act creates a structure of rights without explaining the nature of that structure or how it is intended to operate. It imposes duties of an uncertain magnitude and does not specify how these duties are to be discharged. Confusion has sometimes led to prolonged delays in the making of payments, because owners who have been notified of a possible breach of trust by someone else are unsure of how to discharge their own obligations as trustees.



In the Draft Construction Lien Act, the provisions dealing with the trusts have been completely rewritten. An effort has been made to define clearly the extent of each person's trust obligations and the way in which those obligations may be discharged. The Draft attempts to spell out what an owner or other trustee must do if he receives notice of a possible breach of trust: how much money he must retain and what he is to do with that money.

The trust provisions of the Draft Act have been drafted on the assumption that the trust should be a remedy independent of, but complementary to, the lien provisions of the Act. Because a trust claim is less formal than a lien, a person making a trust claim will not require the assistance of a lawyer. Because the giving of notice of an impending breach of trust under the Draft is less cumbersome than the preservation of a lien, and because there is an expeditious means of disposing of trust disputes, it is possible that trust claims will come to replace the registration of liens as a means whereby subcontractors and workers ensure that they are paid. If this occurs, few lien claims would be registered. This would be beneficial to the industry, because there would be no interruptions in the flow of financing to an improvement.

#### 4. THE DRAFT ACT WOULD CLARIFY THE LIEN PROVISIONS

The nature and extent of the lien are clarified in the Draft. In addition to the simplified drafting, a few substantive changes are made.

The extent of an owner's liability is extended in two cases. Under the Draft Act, where one joint or co-owner improves premises, the interests of the other joint or co-owners are attached by the lien, unless the person making the improvement is informed that the owner contracting for the improvement is not acting as agent for the other owners.

In addition, a new right to a lien against a municipality is given. It applies where, pursuant to an agreement with a municipality, a developer of a subdivision builds a road, sewers or watermains at his own expense. At present, those who supply services or materials to the road, sewers or watermains have no lien rights against the developer of the subdivision, because the land has become the property of the municipality; and no rights against the municipality, because the municipality has not paid for the improvement.

5. THE DRAFT ACT WOULD PROVIDE A SYSTEM FOR THE SECURING OF HOLDBACK FUNDS

The Draft Act contains proposals which would provide for a system of securing the holdback based upon the following principles:

- (a) On construction contracts, where the value of work to be done exceeds \$150,000, other than Crown or municipal contracts, the owner would be required to pay the actual amount of the holdback into a joint trust account.
- (b) The account would be an interest-bearing trust account, held jointly in the name of the owner and the general contractor, as trustees for the benefit of all persons entitled to liens.
- (c) Persons having liens could require the owner and contractor to provide them with all relevant information pertaining to the fund.
- (d) If the owner refused to pay the holdback into such an account, he could be ordered to do so by a court.
- (e) The lien would be a charge upon the sums deposited into the account.
- (f) Interest accruing on the account would be distributed on a rateable basis to those entitled to the holdback.
- (g) Funds would be paid out of the account on the joint signature of the owner and contractor.

The holdback represents money already earned by those who have supplied services or materials to a construction project. Despite this fact, very often those persons find that the owner has not set aside this money and that their claim to a lien against the premises is lower in priority to those of other secured creditors of the owner. Although the Act gives constructors a right to enforce their claim against the premises, this right will often be subordinate to the claims of mortgagees. If the value of the mortgage, including accrued interest, exceeds the value of the premises, then the right of the lien claimant against the premises is illusory.

The existing holdback provisions, in some cases, may contribute to the rate of insolvency in the industry. The Act requires the owner to withhold money which has already been earned from those who are entitled to it. However, it does not require that the owner set the money aside to satisfy the

claims of any lien claimants. The present notional holdback permits owners to retain money belonging to those who have worked on an improvement long after it would be payable if there was no legislation. Thus, the holdback operates as an interest-free loan, used to help finance the owner's project. This was not the intention of those who created the holdback system, but it has become one of the effects. For this reason, the Draft Act contains provisions requiring that the holdback on major projects be secured. These provisions are found in Part IV of the Act.

6. THE DRAFT ACT WOULD CLARIFY BOTH THE EXPIRATION OF LIEN RIGHTS AND THE TIME WHEN HOLDBACK FUNDS MAY BE RELEASED

No owner may properly release the holdback on a construction project until the expiration of the time for preserving a lien against that holdback. Where a holdback is properly retained, the lien is converted from an interest in the premises to a charge against the holdback. Thus, the holdback keeps an owner safe from liability and protects his premises from sale. Any doubt as to whether anyone may still claim a lien against a holdback must result in the owner retaining the holdback. Unfortunately, some concepts in the existing Act are so confused that owners may have difficulty in determining when the holdback may be safely released. In particular, many problems stem from the ambiguity of the Act as it pertains to the expiration of lien rights under completed subcontracts and substantially performed contracts.

When *The Mechanics' Lien Act* was revised in 1969, the apparent intention of the Ontario Law Reform Commission was to permit the safe release of the holdback when the project was substantially completed, that is, when the improvement was ready for use, even though considerable finishing work remained to be done. That intention has not been fully realized.

The Draft Act contains provisions designed to provide for the conclusive determination of the date of substantial performance of a contract or the completion of a subcontract. The expiration of lien rights under this Act is directly related to these dates. It is hoped that these modifications to the law will enable the speedy release of holdback funds,



without jeopardy to owners or disregard for the rights of any person who has worked on the improvement.

7. THE DRAFT ACT WOULD PROVIDE FOR WIDER RIGHTS TO INFORMATION THAN EXIST UNDER THE MECHANICS' LIEN ACT.

While Ontario's *Mechanics' Lien Act* provides for significantly wider rights to information than are available under the legislation of the other provinces of Canada, the rights provided under the existing Act do not appear to be sufficient. The Draft Act would expand these rights. Wider rights to information should both prevent abuse of the Act and facilitate the enforcement of valid claims.

Under the Draft Act, it would be possible to cross-examine the deponent of an affidavit verifying a claim for lien before the commencement of a lien action. This right is not available at present. Such a right should help to police the registration of liens, to ensure that only valid claims are made. In addition, all interested persons will now be entitled to obtain information about the contract, or any subcontract, mortgage, charge or agreement of purchase and sale, even before an action to enforce a lien has been commenced. Often this information will influence the decision of whether or not to proceed with an action. By making this type of information available early, the number of fruitless actions should be reduced.

8. THE DRAFT ACT WOULD CLARIFY HOW LIENS MAY BE DISCHARGED.

The provisions of *The Mechanics' Lien Act* dealing with the discharge of liens are highly ambiguous and confusing. The Draft Act contains provisions designed to clarify the means by which a lien may be discharged. Essentially, a lien may be discharged by: (1) release by the lien claimant; (2) payment into court of an amount reasonable in the circumstances to satisfy the lien claims which have been made; or (3) order of the court, where the circumstances are appropriate. A discharge would be irrevocable and would terminate the lien as an interest in the premises.

9. THE DRAFT ACT WOULD REFORM ENFORCEMENT PROCEDURE.

Many complaints have been received about the procedure for enforcing claims related to the making of an improvement. By far, most of these complaints relate to the present impossibility of joining trust and other claims with an action to enforce a lien. In any ordinary Supreme Court action, all related claims may be joined into a single proceeding. Such joinder reduces the chance of inconsistent verdicts, eliminates the need for multiple proceedings and reduces the costs of enforcing rights.

The Draft Act has been developed upon the assumption that duplication of proceedings should be avoided. As far as possible, a court hearing of a lien action should be empowered to dispose of all related issues in a single proceeding. Therefore, the Draft makes provision for the joinder of all claims related to the making of an improvement into a lien action. Under the Draft Act, joinder applies irrespective of whether these claims are founded in trust, contract, tort, or the lien, so long as it is practical for joinder to be permitted. The court is given a supervisory power to order the severance of any claim, other than a lien claim, from a lien action where it appears to be in the interests of justice to do so. The provisions of the Act in respect to joinder are permissive. The Act still permits separate actions to be brought to enforce claims other than lien claims.

Jurisdiction over lien actions is vested exclusively in the Supreme Court of Ontario. In most cases, this jurisdiction will be exercised by a local judge of the High Court, or on a reference to a master or local master.

10. THE DRAFT ACT WOULD CLARIFY PRIORITIES BETWEEN CONFLICTING INTERESTS

The provisions of *The Mechanics' Lien Act* respecting priorities between conflicting interests are bewildering. They are scattered randomly throughout the Act. Priorities between trust claims are not even discussed. The Draft Construction Lien Act establishes a general scheme of priority basically reflecting court decisions.

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DRAFT CONSTRUCTION LIEN ACT

Section by Section Analysis

# An Act to revise The Mechanics' Lien Act

**H**ER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1.—(1) In this Act,

Interpre-  
tation

## SECTION 1

### Interpretation

The definition section of The Construction Lien Act is significantly larger than the corresponding provisions of The Mechanics' Lien Act. The principal function of a definition section is to clarify the statute by assigning specific meanings to key words and phrases used in the Act. These words and phrases then become terms of art, always carrying with them the meaning which has been ascribed to them by the definition section. The expanded use of terms of art in the Draft Act has enabled the Act to be drafted in a more simplified style.

Paragraph 1, which defines "action", is a new provision. This definition makes it clear that the term action, when used throughout the Act, includes not only a proceeding to enforce a lien claim, but any other action to enforce any other kind of claim when it is joined with a proceeding to enforce a lien claim. The joinder to a lien action of other actions is dealt with in sections 56 and 57 of the Draft.

1. "action" means an action to enforce a lien claim and includes an action to enforce a trust or other claim that is joined with an action to enforce a lien claim;



Section 1 (cont'd)

2. "contract" means the contract between the owner and the contractor;

3. "contractor" means a person contracting with or employed directly by the owner or his agent for the supplying of services or materials in respect of any improvement;

Paragraph 2

In The Mechanics' Lien Act, it was often unclear whether the word "contract" referred only to agreements between the owner and the contractor, or whether it encompassed sub-contracts. This ambiguity has often led to unfortunate results. For example, in some cases, it has been held that the doctrine of substantial performance applies to sub-contracts. However, it is unlikely that this was intended when the substantial performance provisions of The Mechanics' Lien Act were introduced.

In The Construction Lien Act, the word "contract" is used exclusively to refer to an agreement between the owner and a contractor. The word "subcontract" is used to denote agreements between the contractor and a sub-contractor, or between any two subcontractors.

Paragraph 3

This provision is virtually identical to section 1(1)(b) of The Mechanics' Lien Act. It is customary for construction projects to be organized upon what is known as a pyramid pattern. An owner will hire a contractor to make an improvement to his property. The contractor, in turn, will hire a number of specialist subcontractors, each of whom will work on a particular aspect of the project. But only the contractor has direct contractual relations with the owner. The definition of "contractor" contained in the Draft Bill makes it clear that the term "contractor" refers only to a person having a direct contractual relationship with the owner.

(b) "contractor" means a person contracting with or employed directly by the owner or his agent for the doing of work or the placing or furnishing of materials for any of the purposes mentioned in this Act;

Section 1 (cont'd)

4. "court" means the Supreme Court;

5. "cross-claim" means a claim by a defendant against any other person except the person who named him as a defendant;

6. "Crown" includes Crown agencies to which *The Crown R.S.O. 1970, Agency Act* applies;

7. "general lien" means a single lien arising from a single contract or subcontract but attaching to more than one premises belonging to the same owner;

Paragraph 4

Only the Supreme Court of Ontario has jurisdiction in a proceeding under the Draft Act.

Paragraph 5

This is a new provision. A cross-claim is a means by which a defendant may bring another person into an action. The use of the cross-claim procedure is outlined in section 56 of the Draft Act.

Paragraph 6

This provision is identical to section 1(1) (ba) of *The Mechanics' Lien Act*. The purpose of this provision is to make it clear that the special provisions of the Act respecting public works extend to property belonging to Crown agencies.

Paragraph 7

This is a new provision. A general lien may arise in any number of circumstances, but the following hypothetical gives an example typical of all of them. A subcontractor may supply bricks to a contractor who is building 7 homes in a subdivision. The bricks are supplied under a single subcontract, and all the homes are owned by the same owner. In this case, the lien which the subcontractor acquires against each house will be pooled in value, and will attach to the full extent of its pooled value as a single lien against all 7 of the houses.

# DRAFT CONSTRUCTION LIEN ACT

## Section 1 (cont'd)

8. "holdback" means the 10 per cent of the value of the services or materials supplied under a contract or subcontract required to be withheld from payment by this Act, and, where this sum is required to be deposited into a joint account, includes any interest accruing thereon;

9. "improvement" includes anything made, constructed, erected, altered, fitted, repaired or added to any land, building, structure, works, or appurtenances to any of them, or any work done to or in respect of a premises for the purpose of enhancing its value, including the demolition or removal of any building or structure, or part thereof, on the premises and "improved" has a corresponding meaning;

10. "interest in the premises" means an estate of any nature and includes a statutory right given or reserved to the Crown to enter any lands or premises belonging to any person or public authority for the purpose of doing any work, construction, repair or maintenance in, upon, through, over or under any such lands or premises;

## COMMENTS AND EXPLANATION

### Paragraph 8

This is a new provision. While the term "holdback" has become well-known in the construction industry and in Mechanics' Lien practice, it has never been used in The Mechanics' Lien Act itself. In keeping with the general policy that the Draft Act should reflect industry practice and terminology, The Construction Lien Act refers to the "holdback" rather than to "the percentage required to be retained", as the "holdback" is described in the present Act.

### Paragraph 9

This is a new definition, although it is derived, in part, from section 5(1) of The Mechanics' Lien Act. The purpose of the Act is to protect those who contribute their services or materials towards the improvement of premises. The term "improvement" has been given a broad definition to ensure that it encompasses any change beneficial to the premises, including the demolition or removal of a building or structure on the premises. Under this new definition, it is now clear that anything done for the purpose of enhancing the value of premises will give rise to a lien. It will not be necessary to show that the value of the premises has, in fact, increased.

### Paragraph 10

This provision is derived from, and is substantially the same as, section 1(1) (bb) of The Mechanics' Lien Act.

## EXISTING MECHANICS' LIEN ACT

5.—(1) Unless he signs an express agreement to the contrary and in that case subject to section 4, any person who does any work upon or in respect of, or places or furnishes any materials to be used in, the making, constructing, erecting, fitting, altering, improving or repairing of any land, building, structure or works or the appurtenances to any of them for any owner, contractor or subcontractor by virtue thereof has a lien for the price of the work or materials upon the estate or interest of the owner in the land, building, structure or works and appurtenances and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work is done, or upon which the materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner, and the placing or furnishing of the materials to be used upon the land or such other place in the immediate vicinity of the land designated by the owner or his agent is good and sufficient delivery for the purpose of this Act, but delivery on the designated land does not make such land subject to a lien.

(bb) "estate or interest in land" includes a statutory right given or reserved to the Crown to enter any lands or premises of any person or public authority for the purpose of doing any work, construction, repair or maintenance in, upon, through, over or under any such lands or premises;

## DRAFT CONSTRUCTION LIEN ACT

## COMMENTS AND EXPLANATION

## EXISTING MECHANICS' LIEN ACT

## Section 1 (cont'd)

11. "materials" includes every kind of movable property,

- (i) that becomes, or is intended to become, part of the improvement or that is used in the making of the improvement or to facilitate its making, or
- (ii) that is equipment rented without an operator for use in making the improvement;

Paragraph 11

This definition replaces the present definition found in section 1(1)(c) of The Mechanics' Lien Act. The new definition is more elaborate than the existing definition. The new definition makes it clear that the rental of equipment amounts to a supply of materials.

Paragraph 12

This is a new provision. Under The Land Titles Act, which sets out one of the two systems of land registration in operation in Ontario, a mortgage is described as a charge. The purpose of this definition is to ensure that the term "mortgage" when used in The Construction Lien Act is taken to include a reference to a charge under The Land Titles Act.

Paragraph 13

This definition is substantially the same as the existing definition of owner in section 1(1)(d) of The Mechanics' Lien Act. Generally speaking, the lien created by this Act attaches only to the interest in the premises of the owner who commissions the work. If it is a limited estate, then that is all which the lien attaches to.

13. "owner" includes any person, including the Crown and a municipal corporation, having any interest in the premises, and at whose request, and,

- (i) upon whose credit, or
- (ii) on whose behalf, or
- (iii) with whose privity or consent, or
- (iv) for whose direct benefit,

an improvement to the premises is made and includes any person who acquires an interest in the premises through the owner after the services or materials in respect of which the lien is claimed have commenced to be supplied;

(c) "materials" includes every kind of movable property;

(d) "owner" includes any person and corporation, including the Crown, a municipal corporation and a railway company, having any estate or interest in the land upon which or in respect of which work is done or materials are placed or furnished, at whose request, and

- (i) upon whose credit, or
- (ii) on whose behalf, or
- (iii) with whose privity or consent, or
- (iv) for whose direct benefit,

work is done or materials are placed or furnished and all persons claiming under him or it whose rights are acquired after the work in respect of which the lien is claimed is commenced or the materials placed or furnished have been commenced to be placed or furnished;



## EXISTING MECHANICS' LIEN ACT

## COMMENTS AND EXPLANATION

## DRAFT CONSTRUCTION LIEN ACT

## Section 1 (cont'd)

14. "payment certifier" means an architect, engineer or any other person upon whose certificate payments are made under a contract or subcontract;

Paragraph 14

This is a new definition, but provisions of this nature appear in several sections of the existing Act. On major construction projects, it is now customary for payments under a contract to be made upon the certificate of a project supervisor, such as an architect or engineer.

Paragraph 15

This is a new provision. The term "payer" replaces the term "the person primarily liable upon a contract" which was found in numerous provisions of The Mechanics' Lien Act. The term "payer" is concise, and clearly identifies the contractual party who is being described.

Paragraph 16

This is a new definition. It is derived from section 5(1) of the existing Act.

**5.—(1)** Unless he signs an express agreement to the contrary and in that case subject to section 4, any person who does any work upon or in respect of, or places or furnishes any materials to be used in, the making, constructing, erecting, fitting, altering, improving or repairing of any land, building, structure or works or the appurtenances to any of them for any owner, contractor or subcontractor by virtue thereof has a lien for the price of the work or materials upon the estate or interest of the owner in the land, building, structure or works and appurtenances and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work is done, or upon which the materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided by the owner, and the placing or furnishing of the materials to be used upon the land or such other place in the immediate vicinity of the land designated by the owner or his agent is good and sufficient delivery for the purpose of this Act, but delivery on the designated land does not make such land subject to a lien.

16. "premises" includes,
- (i) the improvement,
  - (ii) all material supplied to the improvement, and
  - (iii) the land occupied by the improvement, or enjoyed therewith, or the land upon or in respect of which the improvement was done or made;

## DRAFT CONSTRUCTION LIEN ACT

## Section 1 (cont'd)

17. "price" means the contract or subcontract price,

- (i) agreed between the parties, or
- (ii) where no specific price has been agreed upon between them, the actual value of the services or materials or both that have been supplied to the improvement under the contract or subcontract;

## COMMENTS AND EXPLANATION

## Paragraph 17

This is a new provision. However, it is derived from sections 5(1) and 11(1) of The Mechanics' Lien Act. The word "price" is used in several places in this Act, and this definition will ensure that it is given the same meaning throughout the Act.

## EXISTING MECHANICS' LIEN ACT

5.—(1) Unless he signs an express agreement to the contrary and in that case subject to section 4, any person who does any work upon or in respect of, or places or furnishes any materials to be used in, the making, constructing, erecting, fitting, altering, improving or repairing of any land, building, structure or works or the appurtenances to any of them for any owner, contractor or subcontractor by virtue thereof has a lien for the price of the work or materials upon the estate or interest of the owner in the land, building, structure or works and appurtenances and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work is done, or upon which the materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner, and the placing or furnishing of the materials to be used upon the land or such other place in the immediate vicinity of the land designated by the owner or his agent is good and sufficient delivery for the purpose of this Act, but delivery on the designated land does not make such land subject to a lien.

11.—(1) In all cases, the person primarily liable upon a contract under or by virtue of which a lien may arise shall, as the work is done or the materials are furnished under the contract, retain for a period of thirty-seven days after the completion or abandonment of the work done or to be done under the contract 15 per cent of the value of the work and materials actually done, placed or furnished, as mentioned in section 5, irrespective of whether the contract or subcontract provides for partial payments or payment on completion of the work, and the value shall be calculated upon evidence given in that regard on the basis of the contract price or, if there is no specific contract price, on the basis of the actual value of the work or materials.

(da) "public work" means the property of the Crown and includes land in which the Crown has an estate or interest, and also includes all works and properties acquired, constructed, extended, enlarged, repaired, equipped or improved at the expense of the Crown, or for the acquisition, construction, repairing, equipping, extending, enlarging or improving of which any public money is appropriated by the Legislature, but not any work for which money is appropriated as a subsidy only;

## Paragraph 18

This provision is derived from, and is substantially the same as, clause 1(1) (da) of The Mechanics' Lien Act. The changes in the definition of "public work" are intended only to reflect the terminology used throughout the Draft Act.

18. "public work" means the property of the Crown, including all premises in which the Crown has an interest and all improvements carried out at the expense of the Crown or for which any public money was appropriated by the Legislature, other than an improvement for which money was appropriated as a subsidy only;

# DRAFT CONSTRUCTION LIEN ACT

## Section 1 (cont'd)

19. "share of accrued interest" means a rateable share of any interest accrued and due payable upon the holdback by the bank, trust company or other financial institution in which the holdback has been deposited, but calculated without regard to,
  - (i) the length of time the share of any person in the holdback has actually been retained from him, or
  - (ii) any fluctuation in the rate of interest paid during the period of retention by the bank, trust company or other financial institution in which the holdback was deposited;

20. "subcontract" means any contract between the contractor and a subcontractor or between two or more subcontractors;

21. "subcontractor" means a person not contracting with or employed directly by the owner for the supplying of services or materials but who contracts with or is employed by a contractor or, under him, by another subcontractor;

22. "supplying of services" means the doing of work or performance of a service upon or in respect of an improvement, including the rental of equipment with an operator;

## COMMENTS AND EXPLANATION

### Paragraph 19

This is a new provision. The Draft Act makes provision for the payment of interest on the holdback where this sum is required to be deposited into a joint trust account. This definition of "share of accrued interest" simplifies the calculation of the share of interest to which each person interested in the holdback is entitled. Each rateable share is to be calculated without regard to the length of time the money has been withheld from the beneficiary. Fluctuations in the rate of interest are also to be disregarded. One major argument voiced against the payment of interest on the holdback was that the calculation of each person's share in that interest would become an administrative nightmare if these factors had to be taken into consideration. To avoid such an administrative problem, these matters have been disregarded.

### Paragraph 20

This is a new definition. See notes under paragraph 2 ("contract").

### Paragraph 21

This definition is substantially the same as the present definition found in section 1(1)(g) of The Mechanics' Lien Act.

### Paragraph 22

This is a new definition. However, it is related in part to section 1(2) of The Mechanics' Lien Act. Although services need not be physically performed upon the site of an improvement in order to give rise to a lien, they must have a direct relationship to the process of construction.

## EXISTING MECHANICS' LIEN ACT

- (g) "subcontractor" means a person not contracting with or employed directly by the owner or his agent for any of the purposes mentioned in this Act, but contracting with or employed by a contractor or, under him, by another subcontractor;

- (2) In this Act, the expression "the doing of work" includes the performance of a service, and corresponding expressions have corresponding meanings.



Section 1 (cont'd)

23. "wages" means the money earned by a worker for work done by time or as piece work, and includes all monetary supplementary benefits whether by statute, contract or collective bargaining agreement;

(\*) "wages" means the money earned by a workman for work done by time or as piece work, and includes all monetary supplementary benefits, whether by statute, contract or collective bargaining agreement.

24. "worker" means a person employed for wages in any kind of labour, whether employed under a contract of service or not;

(i) "workman" means a person employed for wages in any kind of labour, whether employed under a contract of service or not.

25. "worker's trust fund" means any trust fund maintained in whole or in part on behalf of any worker on an improvement and into which any monetary supplementary benefit is payable as wages for work done by the worker in respect of the improvement.

Paragraph 23

This provision is virtually identical to section 1(1)(h) of The Mechanics' Lien Act. The Draft Act gives special priority to liens by workers for their wages. See section 87.

Paragraph 24

This provision is virtually identical to section 1(1)(i) of The Mechanics' Lien Act.

Paragraph 25

This is a new definition. The Construction Lien Act provides for the partial subrogation of a workers' trust fund to the lien rights of the workers interested in that fund. Significant portions of workers' wages are now payable to workers' trust funds. These funds are often administered jointly by unions and employers' organizations. See sections 35(6) and 87.

## Section 1 (cont'd)

- When  
supplied
- (2) For the purposes of this Act, materials are supplied when they are,
- (a) placed on the land on which the improvement is done or made;
  - (b) placed upon land in the immediate vicinity designated by the owner or his agent but placing materials on land so designated does not, of itself, make that land subject to a lien; or
  - (c) in any event, incorporated into or used in making or facilitating the making of the improvement.
- (3) A contractor or subcontractor to whom materials are supplied and who designates land under clause b of subsection 2 is deemed to be the owner's agent for that purpose, unless the person supplying the materials has actual notice to the contrary.
- Item

## Subsection 2 and 3

These two subsections consolidate several concepts which are contained in subsections 5(1),(3) and (4) of The Mechanics' Lien Act. The purpose of these two provisions is to enable all parties to determine when materials have been supplied to an improvement. The lien of a materialman does not arise until his materials have been supplied within the meaning of the Act. To summarize the practical effect of these subsections: If materials are delivered to land on which the improvement is to be made, they are deemed to be supplied for the purposes of the Act. The lien arises from the time of the supply. By the same token, if they are delivered to land in the immediate vicinity of the improvement, which is designated by the owner, then they are deemed to be supplied at the time of delivery. It does not matter that the materials are never actually used, if they are provided to be used. Where, however, the materials are delivered to a place which is not in the immediate vicinity of the improvement, such as a central warehouse, they are deemed not to be supplied until they are actually incorporated in the improvement.

3.—(1) Unless he signs an express agreement to the contrary and in that case subject to section 4, any person who does any work upon or in respect of, or places or furnishes any materials to be used in, the making, constructing, erecting, fitting, altering, improving or repairing of any land, building, structure or works or the appurtenances to any of them for any owner, contractor or subcontractor by virtue thereof has a lien for the price of the work or materials upon the estate or interest of the owner in the land, building, structure or works and appurtenances and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work is done, or upon which the materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner, and the placing or furnishing of the materials to be used upon the land or such other place in the immediate vicinity of the land designated by the owner or his agent is good and sufficient delivery for the purpose of this Act, but delivery on the designated land does not make such land subject to a lien.

(3) The lien given by subsection 1 attaches as therein set out where the materials delivered to be used are incorporated into the land, building, structure or works, notwithstanding that the materials may not have been delivered in strict accordance with subsection 1.

(4) In subsection 1, "agent" includes the contractor or subcontractor for whom the materials are placed or furnished, unless the person placing or furnishing the materials has had actual notice from the owner to the contrary.

## COMMENTS AND EXPLANATION

## SECTION 2

2.—(1) For the purposes of this Act, a contract is substantially performed,

(a) when the improvement is ready for use or is being used for the purposes intended; and

(b) when the improvement is capable of completion, or, where there is a patent defect, correction, at a cost of not more than,

- (i) 3 per cent of the first \$500,000 of the contract price,
- (ii) 2 per cent of the next \$500,000 of the contract price, and
- (iii) 1 per cent of the balance of the contract price.

Subsection 1 is derived, but is significantly different, from section 1(3) of The Mechanics' Lien Act. There have been many problems with the doctrine of substantial performance since it was incorporated into The Mechanics' Lien Act. Under the Draft Act, it is now clear that the doctrine of substantial performance applies only to contracts between the owner and the contractor. In other words, it does not apply to subcontracts. To apply the doctrine to subcontracts would not appreciably expedite the release of holdback funds. However, it can jeopardize legitimate lien claims of suppliers and workmen, since they often have no way of determining whether a subcontract has been substantially performed. For this reason, the doctrine of substantial performance has been confined to the main contract only. However, provision is made in the Draft Act for the release of holdback funds on totally completed subcontracts.

The words "shall be deemed" have been removed from the definition of substantial performance. The new Act sets out a procedure for fixing the date of substantial performance, and the use of a deeming clause in the definition might have led to confusion.

The third major change is the increase of the \$250,000 figures described in paragraphs (i) and (ii) to \$500,000. This change has been made to account for the depreciation in the value of the dollar, since the doctrine of substantial performance was first incorporated into the Act.

(3) For the purposes of this Act, a contract shall be deemed to be substantially performed,

- (a) when the work or a substantial part thereof is ready for use or is being used for the purpose intended; and
- (b) when the work to be done under the contract is capable of completion or correction at a cost of not more than,

- (i) 3 per cent of the first \$250,000 of the contract price,
- (ii) 2 per cent of the next \$250,000 of the contract price, and
- (iii) 1 per cent of the balance of the contract price.

## Section 2 (cont'd)

(2) For the purposes of this Act, where the improvement or a <sup>item</sup> substantial part thereof is ready for use or is being used for the purposes intended and the remainder of the improvement cannot be completed expeditiously for reasons beyond the control of the contractor or, where the owner and the contractor agree not to complete the improvement expeditiously, the price of the services or materials remaining to be supplied and required to complete the improvement shall be deducted from the contract price in determining substantial performance.

Under the new definition, it is now clear that only "patent defects" are to be taken into consideration in determining whether or not there has been substantial performance of the contract. A patent defect is one which is self-evident. Under the existing definition, many owners have refused to release the holdback for many months after the substantial performance of the contract, for fear that there may be latent, or hidden, defects in the work which has been done. It is clear that it was never intended for the holdback provisions of the Act to be used for this purpose.

Section 23(2) requires a separate holdback after the certification of substantial performance of a contract to protect the lien rights of those who do finishing or remedial work.

Subsection 2 is derived from, and is similar to, section 1(4) of The Mechanics' Lien Act. The purpose of this provision is to provide for the possibility of severing a completed part of an improvement from the improvement as a whole where the completed part is of use to the owner and the remainder of the improvement cannot be completed expeditiously.

(4) For the purpose of this Act, where the work or a substantial part thereof is ready for use or is being used for the purpose intended and where the work cannot be completed expeditiously for reasons beyond the control of the contractor, the value of the work to be completed shall be deducted from the contract price in determining substantial performance.



## PART I

## GENERAL

3.—(1) Subject to section 17 (where lien does not attach to premises), this Act binds the Crown but does not apply in respect of work under a contract as defined in *The Ministry of Transportation and Communications Creditors Payment Act, 1975* and to which that Act applies.

(2) Section 7 (notice of claim to Crown) of *The Proceedings Against the Crown Act* does not apply in respect of proceedings against the Crown under this Act.

## SECTION 3

This section is virtually identical to section 1a of *The Mechanics' Lien Act*. It permits claims against the Crown to be dealt with in a manner similar to claims against private owners. Provincial road buildings are governed by another statute which has been found to be satisfactory to both the Ministry and road builders. Section 7 of the proceedings against *The Crown Act* deals with the manner of giving notice to the Crown of pending litigation. Notice requirements under that Act are not compatible with those under this Act.

## SECTION 4

In effect, *The Mechanics' Lien Act* permits anyone but a workman earning less than \$50 a day to contract out of the rights and remedies provided him by that Act. Given the rate of pay in the modern construction industry, almost everyone could contract out of his rights under the Act.

Unfortunately, it is usually only those who are most in need of the protection of the Act who will agree to such a waiver.

If other forms of protection, such as labour and material bonds, were universally available to protect the interests of those who supply services and materials, then waiver of rights might be justified. This is not the case. There appears to be little justification for retaining section 4(2) of *The Mechanics' Lien Act* and for this reason it has been deleted from the Draft Construction Lien Act.

4. An agreement by any person who supplies services or materials to an improvement that this Act does not apply to him or that the remedies provided by it are not available for his benefit is void.

1a.—(1) Subject to subsection 2 of section 5, this Act binds the Crown but does not apply in respect of work under a contract as defined in *The Ministry of Transportation and Communications Creditors Payment Act, 1975* and to which that Act applies.

(2) Section 7 of *The Proceedings Against the Crown Act* does not apply in respect of proceedings against the Crown under this Act.

4.—(1) Every agreement, oral or written, express or implied, on the part of any workman that this Act does not apply to him or that the remedies provided by it are not available for his benefit is void.

(2) Subsection 1 does not apply.

(a) to a manager, officer or foreman, or

(b) to any person whose wages are more than \$50 a day.

(3) No agreement deprives any person otherwise entitled to a lien under this Act, who is not a party to the agreement, of the benefit of the lien, but it attaches, notwithstanding such agreement.

5. Every contract or subcontract related to an improvement is <sup>Contract's</sup> deemed to be amended in so far as is necessary, to be in conformity <sup>to conform</sup> with this Act. <sup>to Act</sup>

#### SECTION 5

The new provision is an extension of section 11(8) of The Mechanics' Lien Act. Section 11(8) of that Act only amends contracts so that they are in conformity with the hold-back provisions of that Act. Section 11(8) of The Mechanics' Lien Act was designed to fit with the right of subcontractors to contract out or waive the provisions of that Act. Since section 4 of the Draft would eliminate the right to contract out, it is appropriate that each construction contract, or subcontract, be in conformity with all of The Construction Lien Act.

Where there is a conflict between the terms of a contract, or subcontract, and the terms of The Construction Lien Act, the Act will prevail.

(8) Every contract shall be deemed to be amended in so far as is necessary to be in conformity with this section.

6.—(1) Nothing done under this Act and no claim for lien or trust claim is invalidated by reason only of a failure to comply strictly with any of the requirements of this Act unless in the opinion of the court a person has been prejudiced thereby and then only to the extent of the prejudice suffered.

*Minor irregularities*

SECTION 6

Section 6 of the Draft is an extension of section 18 of The Mechanics' Lien Act. The principle remains the same. A claim, which is otherwise proper, should not be invalidated because of technical deficiencies. However, where an innocent party would suffer injury, because of the failure of a claimant to follow the Act, the section has the effect of invalidating the claim to the extent of the injury that would be suffered if the whole claim were upheld.

It should be noted that the section does not relieve against total failure to comply. It is still necessary to comply with the Act but minor slip-ups are to be forgiven unless someone has suffered as a result.

A major exception is made by subsection 2, which makes clear that requirements for registration and time limits for preserving or perfecting a lien must be strictly complied with. The flow of funds on a construction project from mortgage to owner, to contractors to subcontractors and to workers depends on the ability of each person to rely on strict compliance with these requirements by anyone claiming a lien.

*Saving*

- (2) Nothing in subsection 1,
  - (a) dispenses with a requirement for registration; or
  - (b) extends, or permits the extension of, the time limits for preserving or perfecting a lien.

18.—(1) Substantial compliance with sections 16, 17, 21a and 29 is sufficient and no claim for lien is invalidated by reason of failure to comply with any of the requirements of such sections unless, in the opinion of the judge or officer trying the action, the owner, contractor or subcontractor, mortgagee or other person is prejudiced thereby, and then only to the extent to which he is thereby prejudiced.

(2) Nothing in this section dispenses with the requirement of registration of the claim for lien.

PART II

TRUST PROVISIONS

7.—(1) All sums received by an owner, other than the Crown, a municipality as defined in *The Municipal Affairs Act* or a metropolitan, regional or district municipality or a local board thereof, that are to be used in the financing of an improvement, including the purchase price of the land and the payment of prior encumbrances, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor, subcontractors and other persons who have supplied services or materials to the improvement, and for the benefit of the Workmen's Compensation Board.

Trust funds  
by owner for  
improvement  
finance  
R.S.O. 1971,  
c. 118

SECTION 7

Section 7(1) is substantially similar to section 2(4) of *The Mechanics' Lien Act*. It provides that all monies received by an owner with a view to the financing of an improvement constitute a trust fund for the benefit of all persons who supply services or materials to the improvement, subject to the payment of the purchase price of the land and prior claims on the land. In other words, the trust arises as soon as the owner receives the money, but he may use the money to purchase and clear the title of the land on which the improvement is to be made. Once he has done that, he may only use the trust monies for a purpose authorized by the Act. The extent of the owner's obligations as trustee are described in subsection 3.

Section 7(2) is a second trust obligation imposed on the owner. It is substantially similar to section 2(3) of *The Mechanics' Lien Act*. Subsection 2 constitutes as a trust, money in the owner's hands, or which comes into his hands, after the work is certified as complete. This trust would apply even though the money was not borrowed or otherwise acquired with a view towards financing the improvement. The provision is designed to deal with those situations where the owner is financing an improvement out of his own funds.

(2) Where sums become payable under a contract to a contractor by an owner on the certificate of a payment certifier, an amount equal to the sums so certified that is in the owner's hands or received by him at any time thereafter constitutes a trust fund for the benefit of the contractor, subcontractors and other persons who have supplied services or materials, or both, to the improvement, and for the benefit of the Workmen's Compensation Board.

sums in  
owner's hands,  
after  
certificates  
certified

(4) All sums received by an owner, other than the Crown, a municipality as defined in *The Municipal Affairs Act* or a metropolitan or regional municipality or a local board thereof, which are to be used in the financing, including the purchase price of the land and the payment of prior encumbrances, of a building, structure or work, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund in the hands of the owner for the benefit of the persons mentioned in subsection 1, and, until the claims of all such persons have been paid, the owner shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.

(3) Where a sum becomes payable under a contract to a contractor by an owner on the certificate of a person authorized under the contract to make such a certificate, an amount equal to the sum so certified that is in the owner's hands or received by him at any time thereafter shall, until paid to the contractor, constitute a trust fund in the owner's hands for the benefit of the contractor, subcontractor, Workmen's Compensation Board, workmen, and persons who have supplied materials on account of the contract or who have rented equipment to be used on the contract site, and the owner shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust until all workmen and all persons who have supplied materials on the contract or who have rented equipment to be used on the contract site and all contractors and subcontractors are paid for work done or materials supplied on the contract and the Workmen's Compensation Board is paid any assessment with respect thereto.



Section 7 (cont'd)

(3) The owner is the trustee of the trust funds created by subsections 1 and 2 and he shall not appropriate or convert any part of the funds to his own use or to any use not authorized by the trust until,

- (a) the contractor is paid any amount justly owed to him; and
- (b) provision for the payment of other affected beneficiaries of the trust funds is made under section 10, where, prior to the payment of the contractor, the owner receives notice that payment to the contractor will, or is likely to, result in a breach of a trust by the contractor to those beneficiaries.

Under The Mechanics' Lien Act, the nature of the trustee's obligations, and the method by which these obligations may be discharged, are unclear. The purpose of subsection 3 is to clarify the nature of the trustee's obligation.

Normally, the owner will discharge his obligation to all beneficiaries by paying the contractor. So long as the owner receives no notice that the contractor is in default, or is likely to default in his obligations to other beneficiaries on the improvement, the owner may pay the contractor without fear of liability for breach of trust. Where the owner receives notice that the contractor will, or is likely to default, the owner, as trustee, must make provision for their payment, as provided in section 10.

SECTION 8

8.—(1) All sums, including any interest on the holdback, received by a contractor or subcontractor on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement and for the benefit of the Workmen's Compensation Board and for the benefit of the owner or any contractor or subcontractor to compensate for any just set-off or counterclaim related to the improvement.

2.—(1) All sums received by a builder, contractor or subcontractor on account of the contract price constitute a trust fund in his hands for the benefit of the owner, builder, contractor, subcontractor, Workmen's Compensation Board, workmen, and persons who have supplied materials on account of the contract or who have rented equipment to be used on the contract site, and the builder, contractor or subcontractor, as the case may be, is the trustee of all such sums so received by him and he shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust until all workmen and all persons who have supplied materials on the contract or who have rented equipment to be used on the contract site and all subcontractors are paid for work done or materials supplied on the contract and the Workmen's Compensation Board is paid any assessment with respect thereto.

Section 8(1) replaces section 2(1) of The Mechanics' Lien Act. Section 2(1) of The Mechanics' Lien Act was scarcely comprehensible. The purpose of section 8(1) is the protection of those working on an improvement from the insolvency or bankruptcy of a contractor or subcontractor. Where money is paid under a contract or subcontract after the contractor or subcontractor has gone bankrupt, the money received by the trustee administering the bankrupt's estate is impressed with a trust created by this section, and the trust fund must be distributed to the beneficiaries under this section. Only if there is a surplus does the trustee in bankruptcy become entitled to any of the money paid to the bankrupt contractor or subcontractor.

Section 8(1) includes in the trust fund any interest on the holdback received by the trustee. It is thus intended to operate as an enforcement measure to ensure that interest on the holdback is passed down the construction pyramid. Failure of a contractor or subcontractor to pass along a rateable share of the interest to the persons who are subcontractors under him, will constitute a breach of trust.

It should be noted that section 8(1) provides for the setting-off of debts as between a contractor and subcontractor, and between an owner and contractor. Such set-off will not constitute a breach of trust. By virtue of section 31, set off cannot be claimed against the holdback or interest on the holdback.

COMMENTS AND EXPLANATION

Section 8 (cont'd)

(2) The contractor or subcontractor receiving sums mentioned in subsection 1 is the trustee of the trust fund and he shall not appropriate or convert any part of the fund to his own use or to any use not authorized by the trust until.

(a) subcontractors and other persons who have supplied services or materials to the improvement are paid any amount justly owed by him to them;

(b) the Workmen's Compensation Board is paid for any assessment against him related to the improvement;

(c) the owner and any contractor or subcontractor to whom he has supplied services or materials related to the improvement have been compensated for any just set-off or counterclaim against him related to the improvement; and

(d) provision for the payment of other affected beneficiaries of the trust is made under section 10, where prior to the payment of a person described in clause a, the contractor or subcontractor receives notice that payment to that person will, or is likely to, result in a breach of a trust by that person to those beneficiaries.

9. Except where a trustee under this Part receives notice that payment of the person whom he is liable to pay, will, or is likely to, result in a breach by that person of a trust under this Part, every payment to that person discharges the trust of the trustee making the payment and his obligations and liability as trustee to the extent of the payment made.

Section 8(2) is an attempt to clarify the nature and extent of the contractor's and subcontractors' obligations as trustees. As with the owner's trust, each contractor and subcontractor is free to pay the person whom he owes until he receives notice from some other beneficiary under section 9 that payment of the person owed will, or is likely, to result in a breach of trust by that person. Where such notice is received, the trustee must make provision under section 10 for the payment of the other beneficiaries of the trust.

A trustee under this section is also a trustee of the owner and the person to whom he supplied services and materials. Thus, for example, if a subcontractor misappropriates trust monies and thereby causes a lien to be filed against the owner's property, the owner may bring a breach of trust action against him to recover compensation for the damages the owner has suffered as a result of the breach of the subcontractor's trust.

SECTION 9

This section is new. It makes it clear that a trustee may discharge his obligations by paying the person whom he owes for the services or materials which have been supplied to him. Such payment discharges the trust on a dollar-for-dollar basis.

10.—(1) Where a trustee receives notice that payment to the person whom he is liable to pay will, or is likely to, result in a breach of trust by that person to some other beneficiary of the trust he shall retain from the person whom he is liable to pay a sum sufficient to satisfy the claim underlying the notice in order to make provision for the payment of the other beneficiary and the trustee shall,

- (a) where all parties are agreed as to the amount that the other beneficiary is justly owed, pay the other beneficiary; or
- (b) in all other cases, pay into court the sum retained and apply to the court for relief by way of interpleader,

and upon so doing, the trustee's obligation and liability to the person from whom payment is withheld is thereby discharged to the extent of the payment made under clause *a* or *b*, and the trustee's obligation and liability to the other beneficiary is extinguished.

Civil liability for unpaid notice

(2) In addition to any other ground on which he may be liable, any person who, without reasonable grounds, gives notice that a breach of trust will, or is likely to, result if a payment is made is liable to any person who suffers damage as a result.

#### SECTION 10

This section is also a new provision. Section 10 explains what a trustee must do in the event that he receives notice that a breach of trust is likely if he pays the person whom he is liable to pay. The duties of a trustee in such a situation have never been clear under the existing Act.

The trustee must retain a sum "sufficient to satisfy the claim underlying the notice." If the trustee receives notice that a general breach of trust to all beneficiaries is likely, then he should withhold all payment. On the other hand, if the trustee receives a complaint from a single beneficiary, and there is no reason to believe that the other beneficiaries will not be paid, it would be enough for the trustee to retain a sum sufficient to satisfy the claim of that beneficiary.

Subsection 2 provides for civil liability where notice of a breach of trust is given without reasonable grounds. It is similar to section 36 which imposes civil liability where a lien is improperly preserved.



Reimbursement  
by trustee

**11.** A trustee who pays any claim payable out of a trust fund under this Part by using money not subject to the trust may reimburse the person, including himself, who provided the money, whether as a lender or otherwise, without being in breach of the trust.

SECTION 11

This section replaces and consolidates sections 2(2), (5) and (6) of The Mechanics' Lien Act. The purpose of the provision is to permit a trustee to repay out of trust monies any sums he has borrowed to discharge his obligations under the trust. Where non-trust monies are used to pay a trust beneficiary, trust monies equal to the amount so paid may be retained.

(2) Notwithstanding subsection 1, where a builder, contractor or subcontractor has paid in whole or in part for any materials supplied on account of the contract or for any rented equipment or has paid any workman who has performed any work or any subcontractor who has placed or furnished any materials in respect of the contract, the retention by such builder, contractor or subcontractor of a sum equal to the sum so paid by him shall be deemed not to be an appropriation or conversion thereof to his own use or to any use not authorized by the trust.

(5) Notwithstanding subsection 4, where an owner has himself paid in whole or in part for any work done, for any materials placed or furnished or for any rented equipment, the retention by him from any moneys received from the lender under subsection 4 of a sum equal to the sum so paid by him shall be deemed not to be an appropriation or conversion thereof to his own use or to any use not authorized by the trust.

(6) Notwithstanding anything in this section, where money is lent to a person upon whom a trust is imposed by this section and is used by him to pay in whole or in part for any work done, for any materials placed or furnished or for any rented equipment, trust moneys may be applied to discharge the loan to the extent that the lender's money was so used by the trustee, and any sum so applied shall be deemed not to be an appropriation or conversion to the trustee's own use or to any use not authorized by the trust.

Assignment  
subject to  
trust

**12.** Where a right to any payment which upon receipt by the assignor would be subject to a trust under this Part is assigned, the moneys received by the assignee are subject to the trust.

SECTION 12

This provision is new. The new provision is based upon a recommendation by the consultant to the Nova Scotia Law Reform Commission. The purpose of the section is to ensure that the benefits of the Act are not lost by the simple devise of a person who is subject to a trust assigning all his interest in those monies to some other person or institution.

Personal liability of directors for breach of trust of corporation

13.—(1) In addition to the persons who are otherwise liable in an action for breach of trust under this Part,

- (a) every director or officer of a corporation; and
- (b) every other person having effective control of a corporation,

who assents to or acquiesces in conduct that amounts to a breach of trust by the corporation is personally liable for the breach of trust.

Determination of effective control

(2) The question of whether a person has effective control of a corporation is one of fact and in determining this the court may disregard the outward form of transactions and the separate corporate existence of the participants.

Application of R.S.O. 1970, c. 296

(3) The provisions of *The Negligence Act* in respect of the determination of degrees of fault and to apportionment of liability therefor apply to an action for breach of the trust imposed by section 7 or 8.

#### SECTION 13

The purpose of this new section is to prevent the use of a shell corporation as a vehicle for defrauding creditors. The use of such corporations has proven, at times, to be a problem in the construction industry. This section allows the court to disregard the limited liability status of a corporation and to affix liability upon those who are actually responsible for a breach of trust.

This section replaces the penal provisions of *The Mechanics' Lien Act* which can be found in section 2(7) of that Act. It is felt that the penal provisions are unnecessary in light of section 296 of the Criminal Code which makes it an indictable offence, punishable by up to 14 years imprisonment, to convert trust funds with an intent to defraud. Where there is no intent to defraud, the civil liability for breach of trust should be sufficient to rectify any breach of trust. It is significant to note that section 2(7) has rarely, if ever, been used in Ontario, even though it has been on the books for well over 20 years.

The Negligence Act, referred to in subsection 3 permits joint wrongdoers to claim contribution and indemnity from each other, and the court to apportion liability between them. By virtue of subsection 3, these remedies may now also be involved where there is more than one trustee guilty of a breach of trust.

(7) Every person upon whom a trust is imposed by this section who knowingly appropriates or converts any part of any trust moneys referred to in subsection 1, 3 or 4 to his own use or to any use not authorized by the trust is guilty of an offence and on summary conviction is liable to a fine of not more than \$5,000 or to imprisonment for a term of not more than two years, or to both, and every director or officer of a corporation who knowingly assents to or acquiesces in any such offence by the corporation is guilty of such offence, in addition to the corporation, and on summary conviction is liable to a fine of not more than \$5,000 or to imprisonment for a term of not more than two years, or to both.

## COMMENTS AND EXPLANATION

## SECTION 14

**14.** No proceeding to assert a claim to any trust fund shall be brought later than one year after the payment upon which the claim is made became due.

Limitation  
period of  
trust claim

This section replaces section 3 of The Mechanics' Lien Act. Section 3 sets up a limitation period which only applies in respect to actions against banks and other lending institutions. It would not apply in actions against the statutory trustees themselves. While it is clear that an open-ended tracing period would be harmful to lending institutions, there is no reason why the special limitation period set up by the Act should apply only to them. Open-ended tracing is equally harsh to the construction industry. It seems preferable for the same limitation period to apply to all trust actions under this part of the Draft Act.

The special limitation period is justified by the practical peculiarities of the trusts arising under this Act. Unlike many types of trusts, where a trust under this Act is breached, it will usually be quickly discovered. The purpose of the trust is to ensure that those who have supplied services or materials to an improvement are paid for their efforts. The trust is discharged by making payment. If a beneficiary does not get paid, he will be aware within a short period of time of the breach of trust. A limitation period of a year would appear to cause no hardship even in the case of trust provisions for workers.

Under this provision, the limitation period runs from the date when payment is due. The one-year limitation period should encourage the expeditious resolution of trust disputes.

**3.** No action to assert any claim to trust moneys referred to in section 2 shall be commenced against a lender of money to a person upon whom a trust is imposed by that section except.

- (a) in the case of a claim by a contractor or subcontractor in cases not provided for in clauses b, c and d, within nine months after the completion or abandonment of the contract or subcontract;
- (b) in the case of a claim for materials, within nine months after the placing or furnishing of the last material;
- (c) in the case of a claim for services, within nine months after the completion of the service; or
- (d) in the case of a claim for wages, within nine months after the last work was done for which the claim is made.

## DRAFT CONSTRUCTION LIEN ACT

## COMMENTS AND EXPLANATION

## EXISTING MECHANICS' LIEN ACT

## PART III

## THE LIEN

15. A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien, for the price of the services or materials that have been supplied, upon the interest of the owner in the premises improved.

## SECTION 15

This section replaces section 5(1) of The Mechanics' Lien Act. The purpose of this section is to create a lien in favour of all those who supply services or materials to an improvement over the premises improved. The lien created by this section did not exist at common law, and is totally a creature of statute. The lien gives the supplier of services or materials a right against the property improved.

5.—(1) Unless he signs an express agreement to the contrary and in that case subject to section 4, any person who does any work upon or in respect of, or places or furnishes any materials to be used in, the making, constructing, erecting, fitting, altering, improving or repairing of any land, building, structure or works or the appurtenances to any of them for any owner, contractor or subcontractor by virtue thereof has a lien for the price of the work or materials upon the estate or interest of the owner in the land, building, structure or works and appurtenances and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work is done, or upon which the materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner, and the placing or furnishing of the materials to be used upon the land or such other place in the immediate vicinity of the land designated by the owner or his agent is good and sufficient delivery for the purpose of this Act, but delivery on the designated land does not make such land subject to a lien.

## SECTION 16

16. A person's lien arises and takes effect when he first <sup>When lien arises</sup> supplies his services or materials to the improvement.

This new section replaces in part section 7(4) of The Mechanics' Lien Act. It makes it clear when the lien arises.

(4) The time at which the first lien arose shall be deemed to be the time at which the first work was done or the first materials placed or furnished, irrespective of whether a claim for lien in respect thereof is registered or enforced and whether or not such lien is before the court.



17. Where the premises improved is,  
(a) a public street or highway owned by a municipality; or  
(b) a public work,

Where lien  
does not  
attach to  
premises

the lien does not attach to the premises but instead constitutes a charge on the holdbacks under Part IV and the provisions of this Act shall be construed, with necessary modifications, to have effect without requiring the registration of a claim for lien against the premises.

SECTION 17

This section is substantially the same as section 5(2) of The Mechanics' Lien Act.

The attachment of a lien against a municipal road is impractical. The attachment of a lien to property of the Crown is theoretically absurd as the Crown is the source of property rights. The compulsory sale of these types of properties under court order is incongruous.

The purpose of this section is to create a system of charges equivalent in value to the lien against land to protect those who supply services or materials to a public street or highway owned by a municipality or a public work.

(2) Where the land or premises upon or in respect of which any work is done or materials are placed or furnished is,

- (a) a public street or highway owned by a municipality;
- or
- (b) a public work,

the lien given by subsection 1 does not in any event attach to such land or premises but shall instead constitute a charge on amounts directed to be retained by section 11, and the provisions of this Act shall be construed, *mutatis mutandis*, to have effect without requiring the registration or enforcement of a lien or a claim for lien against such land or premises.

## EXISTING MECHANICS' LIEN ACT

## COMMENTS AND EXPLANATION

## DRAFT CONSTRUCTION LIEN ACT

## SECTION 18

18.—(1) A lien is limited in amount to the sum due to the person having the lien after the deduction of all just set-offs and counterclaims against him with respect to the improvement, and, in addition, except as otherwise provided in this Act, it is further limited in amount,

- (a) to the sum owed by the owner to the contractor; and
- (b) where the lien is claimed by a person other than the contractor, to the sum owed in respect of the improvement to the payer of the person having the lien.

Section 18(1) consolidates into one subsection a number of concepts which are now found in section 5(1), 9 and 10 of The Mechanics' Lien Act.

Except where he commits a breach of trust, or fails to retain the holdback as required in Part IV of the Draft Act, the owner is not liable to pay more than what he owes the contractor for the work done on his property. Except for this provision, the value of the liens would often exceed the value of the work done. For example, if the value of the contractor's contract and the improvement made was \$1,000, the contractor would have a lien for \$1,000. However, everyone who had supplied services or materials to the contractor would also be entitled to a lien. If the value of the services or materials supplied to the contractor by his subcontractors was \$500, then the total value of the liens against the property would be \$1,500. It can be seen that it is important to limit the owner's liability to the amount that he owes to the contractor.

Clause (b) further limits the liens of persons claiming under the contractor. No person's lien can exceed the amount owing in respect to the improvement to the person above him in the construction pyramid.

Of course, every lien is limited in amount to the sum due to the person having the lien after deductions for set-offs and counterclaims, for example, arising out of defective work by the person claiming the lien.

Section 18(2) makes it clear that the value of all the liens claimed by persons who supply services and materials to the same contractor or subcontractor cannot exceed the amount owed to that contractor or subcontractor.

5.—(1) Unless he signs an express agreement to the contrary and in that case subject to section 4, any person who does any work upon or in respect of, or places or furnishes any materials to be used in, the making, constructing, erecting, fitting, altering, improving or repairing of any land, building, structure or works or the appurtenance to any of them for any owner, contractor or subcontractor by virtue thereof has a lien for the price of the work or materials upon the estate or interest of the owner in the land, building, structure or works and appurtenances and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work is done, or upon which the materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner, and the placing or furnishing of the materials to be used upon the land or such other place in the immediate vicinity of the land designated by the owner or his agent is good and sufficient delivery for the purpose of this Act, but delivery on the designated land does not make such land subject to a lien.

9. Save as herein otherwise provided, the lien does not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor.

10. Save as herein otherwise provided, where the lien is claimed by any person other than the contractor, the amount that may be claimed in respect thereof is limited to the amount owing to the contractor or subcontractor or other person for whom the work has been done or the materials were placed or furnished.

(2) The total value of the liens of all members of a class, as <sup>Item</sup> defined in section 85, is limited to the sum owed in respect of the improvement to the payer of the class.

## Section 18 (cont'd)

(3) Despite clause 2 of subsection 1, where land is dedicated to a municipality as a public street or highway, and an improvement is made to the street or highway at the request of, or under an agreement with, the municipality, and,

(a) to its specifications; or

(b) under its supervision,

but not at its expense, the municipality shall nevertheless, on default of payment by the proper payer, be liable to the value of the holdbacks under Part IV that would have been required if the improvement was made at the expense of the municipality.

Section 18(3) is designed to rectify a problem that exists with respect to the supply of services and materials in connection with roads, sewers and watermains in a new subdivision.

When a plan of subdivision in a municipality is registered, the land for public streets is dedicated to the municipality. This is quite appropriate. However, an anomalous situation often results to the detriment of those who supply services or materials in connection with the sewers, watermains and roads.

The municipality is the owner of the land.

If the improvements were made, as in the case of ordinary roads, sewer and watermain works, by the municipality, the municipality would be liable on its contract for amounts justly owed by it for services or materials. Unpaid persons can make a claim. However, subdivision agreements between the developer and the municipality often provide for the developer to build the roads to the municipality's specifications, but to be paid for at the developer's expense.

Despite the benefit of the roads going to the municipality, under existing law, no claim can be made against the municipality, since it does not pay for the improvement. Subsection 3 reverses this situation and makes the municipality financially responsible to the amount of the proper holdbacks, where the developer defaults in payment. The municipality can protect itself from liability by taking security in the form of bonds or otherwise from the developer.

19. Where the interest of the owner in the premises is held jointly or in common with other persons who knew or ought reasonably to have known of the making of the improvement, for the purposes of this Act the owner is deemed to have been acting not only for himself but also as agent for those other persons, and their joint or common interest in the premises is also subject to the lien unless the contractor has had actual notice, before the improvement is made, that the owner is not acting as their agent.

## SECTION 19

This section replaces section 6 of The Mechanics' Lien Act. Section 6 of the existing Act provides that the husband is conclusively presumed to have been acting for his wife, as well as for himself, in contracting for improvements. It would be possible to simply presume spouses to be acting as agents for each other. However, there appears to be a need for a more general provision to deal with co-owners and joint owners where the owners are aware that an improvement is being done. The improvement will be to their mutual benefit, and it seems fair that they should share responsibility for the costs of the improvement where the person who contracted for the improvement defaults.

## SECTION 20

20.—(1) Subject to subsection 2, where the interest to which the lien attaches is leasehold, the interest of the landlord is also subject to the lien to the same extent as the interest of the owner if the contractor gives notice in writing, by personal service, to the landlord of the improvement to be made, unless the landlord within fifteen days thereafter gives notice in writing by personal service to the contractor that he assumes no responsibility for the improvement being made.

(2) No forfeiture or attempted forfeiture of the lease on the part of the landlord or cancellation or attempted cancellation of the lease, except for non-payment of rent, deprives any person otherwise entitled to a lien of the benefit of the lien, but the person entitled to the lien may pay any rent accruing after the time when his lien arises, and the amount so paid may be added to his claim.

Where landlord's interest in premises is subject to lien for improvements

Lien

6. Where work is done or materials are placed or furnished to be used upon or in respect of the land of a married woman, or in which she has an interest or an inchoate right of dower, with the privity or consent of her husband, he shall be presumed conclusively to be acting as her agent as well as for himself for the purposes of this Act unless before doing the work or placing or furnishing the materials the person doing the work or placing or furnishing the materials has had actual notice to the contrary.

7.—(1) Where the estate or interest upon which the lien attaches is leasehold, the fee simple is also subject to the lien if the person doing the work or placing or furnishing the materials gives notice in writing, by personal service, to the owner in fee simple or his agent of the work to be done or materials to be placed or furnished unless the owner in fee simple or his agent within fifteen days thereafter gives notice in writing, by personal service, to such person that he will not be responsible therefor.

(2) No forfeiture or attempted forfeiture of the lease on the part of the landlord, or cancellation or attempted cancellation of the lease except for non-payment of rent, deprives any person otherwise entitled to a lien of the benefit of the lien, but the person entitled to the lien may pay any rent accruing after he becomes so entitled, and the amount so paid may be added to his claim.



General  
lien

**21.** Where a single contract or subcontract is for the supplying of services or materials to improvements on more than one premises that are owned by the same person, the person supplying the services or materials may choose to have his lien follow the form of the contract or subcontract and be a general lien that is for the entire price of all services and materials that are supplied to all the premises, but if he does so choose, the lien is subject to subsection 2 of section 41 (apportionment of general lien).

#### SECTION 21

This section is derived from section 33 of The Mechanics' Lien Act.

There are several major differences between section 33 of The Mechanics' Lien Act and the new provision. It is now clear that a general lien may be claimed in the case of both contracts and subcontracts. In addition, a general lien may now be claimed for both the supply of materials and services.

The purpose of the general lien is to assist suppliers of services or materials to subdivisions. These persons are often in the most vulnerable financial position in the construction industry. It is also difficult to itemize the use of materials in individual buildings in a subdivision.

#### PART IV

##### THE HOLDBACKS

Lien  
charge on  
holdbacks

**22.** The lien created by Part III is a charge upon the holdbacks required to be retained by this Part in favour of all persons who supply services or materials to the persons to whom those holdbacks are respectively payable.

#### SECTION 22

This provision is derived from, and is substantially similar to, section 11(5) of The Mechanics' Lien Act.

The major effect of this provision is that where an owner complies with the Act, the holdback fund will take the place of the premises and the lien becomes converted to a charge against the fund.

**33.** Where an owner enters into an entire contract for the supply of materials to be used in several buildings, the person supplying the materials may ask to have his lien follow the form of the contract and that it be for an entire sum upon all the buildings, but, in case the owner has sold one or more of the buildings, the judge or officer trying the action has jurisdiction equitably to apportion against the respective buildings the amount included in the claim for lien under the entire contract.

(5) The lien is a charge upon the amount directed to be retained by this section in favour of lien claimants whose liens are derived under persons to whom the moneys so required to be retained are respectively payable.

Basic  
holdback

**23.—(1)** Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until the expiration of the period, as set out in Part V, for the preservation of all liens which may be claimed against that holdback.

#### SECTION 23

This section replaces section 11(1) of *The Mechanics' Lien Act*. It is, however, a major departure from the holdback provisions of the existing Act.

First, the percentage retained by a person who is paying on a contract or subcontract has been reduced from 15 per cent, under the existing Act, to 10 per cent. The rationale for the change is discussed in Part I of this Discussion Paper, dealing with major changes contained in the Draft.

Second, section 23 provides for two holdbacks, instead of the one holdback under the existing Act. The holdback established by subsection 1 requires the person paying on a contract to retain 10 per cent of the price of the services or material supplied to an improvement from the commencement of a contract, until the project is certified as substantially performed.

If no liens are filed with respect to that holdback, the holdback may be released following the period of sixty days after the certification of substantial performance. These matters are set out in sections 26, 27 and 28 and in Part V of the Act. On small projects, this holdback will ordinarily arise at the time a project is commenced and will last until the project is totally completed.

The rationale for the change to a two holdback system is fully discussed in Part I of this Discussion Paper, dealing with major changes in the Draft.

**11.—(1)** In all cases, the person primarily liable upon a contract under or by virtue of which a lien may arise shall, as the work is done or the materials are furnished under the contract, retain for a period of thirty-seven days after the completion or abandonment of the work done or to be done under the contract 15 per cent of the value of the work and materials actually done, placed or furnished, as mentioned in section 5, irrespective of whether the contract or subcontract provides for partial payments or payment on completion of the work, and the value shall be calculated upon evidence given in that regard on the basis of the contract price or, if there is no specific contract price, on the basis of the actual value of the work or materials.

## COMMENTS AND EXPLANATION

## DRAFT CONSTRUCTION LIEN ACT

## Section 23 (cont'd)

(2) Where the contract has been certified as substantially performed but services or materials remain to be supplied in order to complete the contract, the payer upon the contract, or a subcontract, under which a lien may arise shall retain, from the date certified as the date of substantial performance of the contract, a separate holdback equal to 10 per cent of the price of the remaining services or materials as they are actually supplied under the contract or subcontract, until the expiration of the period, as set out in Part V, for the preservation of all liens which may be claimed against that holdback.

Subsection 2 creates the second holdback. Where there has been certification of substantial performance of the contract, the holdback relating to the period between the commencement and the certification of substantial performance of the contract will be released prior to the completion of finishing work. Subsection 2 creates a second holdback, in these cases, to protect the finishing trades. The holdback commences from the date of substantial performance of the contract, and continues until the contract is totally completed.

Subsection 3 is similar to part of section 11(1) of the existing Act. It requires the retaining of a holdback whether the contract or subcontract is paid for in partial payments, or only on completion. The money that constitutes the holdback must be set aside as the work is done irrespective of how the work is paid for. This subsection modifies the rule set out in section 18 that the owner is not liable for more than he owes to the contractor. Where there is default on a contract which calls for payment on completion, the owner is still liable for the holdback even though he may not be liable for payment on the contract to the contractor.

Where there is default on a contract which calls for payment on completion, the owner is still liable for the holdback even though he may not be liable for payment on the contract to the contractor.

(2) Where a contract is under the supervision of an architect, engineer or other person upon whose certificate payments are to be made and thirty-seven days have elapsed after a certificate issued by that architect, engineer or other person to the effect that the subcontract has been completed to his satisfaction has been given to the person primarily liable upon that contract and to the person who became a subcontractor by a subcontract made directly under that contract, the amount to be retained by the person primarily liable upon that contract shall be reduced by 15 per cent of the subcontract price or, if there is no specific subcontract price, by 15 per cent of the actual value of the work done or materials placed or furnished under that subcontract, but this subsection does not operate if and so long as any lien derived under that subcontract is preserved by anything done under this Act.

(3) The obligation to retain the holdbacks under subsections 1 <sup>Idem</sup> and 2 applies irrespective of whether the contract or subcontract provides for partial payments or payment on completion.

Separate  
for finishing  
work

**24.—(1)** Where the contract price or estimated price of services or materials to be supplied under a contract is \$150,000 or more, the owner shall pay the holdback required to be retained by subsection 1 of section 23 into a joint trust account.

#### SECTION 24

This provision is new. The purpose of this section in the Draft is to establish a procedure for securing the holdback. Since before the turn of the century, owners have been required to maintain a holdback. However, the experience of the construction industry has been that the holdback is usually more notional than real. Only rarely is an actual holdback fund set aside by the owner. In most cases, the owner will deduct the holdback percentage from his payment, but he will not put this money aside to satisfy any lien claims. When such claims are made, it is often discovered that there is no money available to satisfy the claims. Although the property can be sold, this process is lengthy and cumbersome. The interest accruing on prior mortgages will usually eat away any extra value in the project, depriving the suppliers of services and materials of the amount that should have been set aside to satisfy their claims.

It is also unfair that no interest is paid on the money withheld at present. In many cases, what is intended as a security scheme has been turned into an interest-free loan to the owner.

The holdback does not belong to the owner, but rather, belongs to those who have contributed services and materials to the improvement. Its purpose is to provide security to subcontractors and labourers, not to assist the owner in the financing of his endeavours. It has become clear, that for the holdback to provide the protection which it was intended to achieve in large projects, provision must be made for the security of these funds.



## Section 24 (cont'd)

(2) Where the owner is not required by subsection 1 to pay the holdback into a joint trust account but the owner agrees in writing to do so, the holdback shall be dealt with in the same manner as if subsection 1 applied.

(3) The joint trust account required by subsection 1, <sup>by agreement</sup> <sup>requirements</sup> <sup>respecting</sup>

(a) shall be opened and held in the joint names of the owner and the contractor as trustees;

(b) may be maintained at any chartered bank, trust company or other financial institution;

(c) shall be an interest bearing account;

(d) shall be held in trust for those who have a charge upon the holdback;

(e) shall require the signatures of both trustees for payment out of the account unless otherwise ordered by the court.

(4) When an owner fails to pay the holdback into a joint trust account as required by subsection 1 or 2, or in any case where an owner is required to retain a holdback, the court, <sup>application</sup> <sup>to court</sup>

(a) upon the application of any person having a lien; and

(b) where it is satisfied that the owner is required by subsection 1 or 2 to pay the holdback into a joint trust account or that it is necessary or desirable to secure the holdback,

shall order the owner to pay the holdback into a joint trust account.

Under subsection 1, the holdback must be deposited into a joint, interest-bearing, trust account on any contract where the value of the services or materials to be supplied totals \$150,000 or more. The contract price at which the holdback must be secured was set at \$150,000, because the administrative costs of securing the holdback, in the case of small improvements, might offset the benefits obtained through such security.

Subsection 2 provides that in contracts for less, the owner and the contractor may agree to comply with the security provisions of this section.

Subsection 3 sets out the characteristics of the joint trust account.

Subsection 4 provides for application to the court where there is failure by the owner to comply with subsections 1 or 2, or in cases where those who have supplied services or materials have become apprehensive about the owner's ability to pay on the contract.

These provisions are unlikely to be brought into play in the case of home improvements, because the cost of such applications is not warranted in those circumstances.

## COMMENTS AND EXPLANATION

## DRAFT CONSTRUCTION LIEN ACT

## Section 24 (cont'd)

Court  
substitution  
of person  
for contractor

(5) Where, on the application of any person having a lien, the court is satisfied that there is a risk that the joint trust account or the holdback may not be properly administered by reason of the relationship between the owner and the contractor, it may appoint any other person to act as the contractor for the purpose of administering the joint trust account and the holdback.

Idem

(6) In determining the relationship between the owner and the contractor under subsection 5, the question of the relationship is one of fact, and the court may disregard the outward form of transactions and the separate corporate existence of the participants.

Idem

(7) Notice of an application under subsection 5 shall be given to every person who supplies services or materials directly to the contractor.

Agreement  
to substitute  
person for  
contractor

(8) Where two-thirds of the number of persons entitled to notice under subsection 7 agree with the owner that the contractor or any other person shall be the contractor for the purpose of administering the joint trust account and the holdback, that agreement is binding on all other persons.

Subsection 5 provides for the court appointment of a person other than the contractor to act as joint trustee with the owner in administering the trust fund. This provision for an application is designed to deal with certain situations where the owner and the contractor are not dealing at arms' length. This often occurs where the owner is acting through a construction corporation as his own contractor. There may be some other valid reason for not wanting the contractor to act as trustee under this section. Any person having a lien, that is, any person who has supplied services or materials to the improvement, may apply to the court for the appointment of a person to execute the powers and duties of the contractor in respect to the holdback.

Subsection 8 provides that the primary subcontractors, that is, those persons who supply services or materials directly to the contractor, and the owner may agree to have a person act as the contractor. In such cases, no application to court will be possible as an agreement by two-thirds of the primary subcontractors and the owner is binding on all other parties. The approach taken in subsection 8 is to permit the concerned parties to work out their arrangement by agreement and avoid, where possible, recourse to the courts.

There are a number of provisions in the Act designed to ensure that interest on the holdback is paid down to the subcontractors.

Section 24 (cont'd)

(9) This section does not apply where the owner is the Crown or a municipality.

Where owner is the Crown or a municipality

Subsection 9 provides that the section does not apply where the owner is the Crown or municipality. Because of the large number of projects in which these institutions are involved, it would not be desirable for them to be bound by this section. These are public bodies and the administration of joint accounts with the private sector would also be difficult to justify and legally difficult to arrange. The security of the holdback has never been a problem as far as the Crown and municipalities are concerned.

SECTION 25

This section is derived from, and is substantially similar to, section 11(6) of The Mechanics' Lien Act.

25.—(1) A payer acting in good faith may, without jeopardy, make payments on a contract or subcontract up to 90 per cent of the price unless, prior to making payment, the payer has received,

Payments made on a contract or subcontract

(a) written notice of a lien; or

(b) notice that such payment will or is likely to result in a breach of trust under Part II by the person whom he is liable to pay.

(2) Where a payer has received a notice as described in subsection 1, and has retained, in addition to the holdback required by this Part, a sum sufficient to satisfy the claim underlying the notice, the payer acting in good faith may, without jeopardy, make payment on a contract or subcontract up to 90 per cent of the price less the sum retained.

Lien

(6) All payments up to 85 per cent as fixed by subsection 1 and payments permitted as a result of the operation of subsections 2 and 3 made in good faith by an owner to a contractor, or by a contractor to a subcontractor, or by one subcontractor to another subcontractor, before notice in writing of the lien given by the person claiming the lien to the owner, contractor or subcontractor, as the case may be, operate as a discharge *pro tanto* of the lien.

## DRAFT CONSTRUCTION LIEN ACT

## COMMENTS AND EXPLANATION

## EXISTING MECHANICS' LIEN ACT

## SECTION 26

Payment that may be made of holdback in respect of completed subcontract

**24.**—(1) Where a subcontract has been certified or declared complete under section 34, each payer upon the contract or a subcontract may, without jeopardy, make payment reducing the holdbacks required by section 23 to the extent of the amount of holdback he has retained in respect of the completed subcontract, where,

- (a) all liens in respect of the completed subcontract have expired as provided in Part V or have been satisfied or discharged; and
- (b) the payer has not received notice that such payment will or is likely to result in a breach by the person whom he is liable to pay of a trust under Part II.

- (2) Where the holdback to be reduced under subsection 1 is <sup>item</sup> deposited in a joint account, the account shall be reduced by the holdback retained in respect of the subcontract certified or declared as complete, including a share of accrued interest earned to the date of payment.

**27.**—(1) A payer upon a contract or subcontract may, without jeopardy, make payment of the holdback required by subsection 1 of section 23 (basic holdback) so as to discharge all claims in respect of that holdback, where,

- (a) all liens which may be claimed against that holdback have expired, as provided in Part V, or have been satisfied or discharged; and
- (b) the payer has not received notice that such payment will or is likely to result in a breach by the person whom he is liable to pay of a trust under Part II.

- (2) Where the holdback to be paid under subsection 1 is <sup>item</sup> deposited in a joint account, shares of the accrued interest shall also be paid.

This provision replaces section 11(3) of The Mechanics' Lien Act.

Subsection 1 must be read in conjunction with Part V of the Act, and in particular, the section dealing with certification of the completion of a subcontract.

The purpose of subsection 1 is to allow the full payment of totally completed subcontractors so that they do not have to wait until there is substantial completion or completion of the project. A large project may take several years to be completed and the subcontractors working on early work, such as excavation of the site, should not have to wait until the project is substantially completed or completed before they receive their holdback.

Subsection 2 is designed to ensure that completed subcontractors receive a fair share of interest accrued in the joint trust account.

## SECTION 27

This section replaces section 11(7) of The Mechanics' Lien Act.

Section 27 specifies the conditions under which the holdback required by section 23(1) may be paid out. These are set out in clauses (a) and (b) of subsection 1. Section 27 must be read in conjunction with Part V of the Act which deals with expiry of liens and the certifying of substantial performance of the contract.

- (3) Where a certificate issued by an architect, engineer or other person to the effect that a subcontract by which a subcontractor became a subcontractor has been completed to the satisfaction of that architect, engineer or other person has been given to that subcontractor, then, for the purposes of subsections 1, 2 and 3 of section 21, section 23 and section 23a, that subcontract and any materials placed or furnished or to be placed or furnished thereunder and any work done or to be done thereunder shall, so far as concerns any lien thereunder of that subcontractor, be deemed to have been completed or placed or furnished not later than the time at which the certificate was so given.

- (7) Payment of the percentage required to be retained under this section may be validly made so as to discharge all claims in respect of such percentage after the expiration of the period of thirty-seven days mentioned in subsection 1 unless in the meantime the appropriate steps have been taken to preserve the lien as provided by sections 22 and 23, or 22a and 23a, as the case may be, in which case the owner may pay the percentage into court in the proceedings, and such payment constitutes valid payment in discharge of the owner to the amount thereof.



**28.** The payer upon a contract or subcontract may, without jeopardy, make payment of the holdback required by subsection 2 of section 23 (holdback for finishing work) so as to discharge all claims in respect of that holdback, where,

- (a) all liens which may be claimed against that holdback have expired, as provided in Part V, or have been satisfied or discharged; and
- (b) the payer has not received notice that such payment will or is likely to result in a breach by the person whom he is liable to pay of a trust under Part II.

**29.** Where an owner, contractor or subcontractor makes a payment without obligation to do so to any person having a lien for or on account of any debt justly due to that person for services or materials supplied to the improvement and promptly gives notice of the payment to the proper payer of that person, the payment shall be deemed to be a payment by the owner, contractor or subcontractor to the proper payer of that person but not so as to affect the holdback.

#### SECTION 28

Section 28 is new to the Draft. It corresponds to section 27, but pertains to holdbacks retained in respect to services or materials supplied between the certification of substantial performance of the contract and the completion of the contract.

This provision only comes into play where there is a certification of substantial performance of the contract. It would not apply to most home improvement contracts.

#### SECTION 29

This section is substantially the same, and is derived from, section 12 of The Mechanics' Lien Act.

This section permits the owner or other person who receives a claim from a subcontractor with whom he does not have contractual relations to pay any debt owing to that subcontractor related to the improvement. On making such a payment, the person who has paid may withhold a corresponding amount from the person who was supposed to pay the claimant. However, to take advantage of this section, the person making the payment must comply with its terms. A change has been made in this section deleting the formal requirement for written notice and replacing the three-days' notice with a requirement that the notice be prompt. This section is analogous to section 10 which provides for the payment of trust claimants where the parties can agree to the amount justly owed.

**12.** If an owner, contractor or subcontractor makes a payment to any person entitled to a lien under section 5 for or on account of any debt, justly due to him for work done or for materials placed or furnished to be used as therein mentioned, for which he is not primarily liable, and within three days afterwards gives written notice of the payment to the person primarily liable, or his agent, the payment shall be deemed to be a payment on his contract generally to the contractor or subcontractor primarily liable but not so as to affect the percentage to be retained by the owner as provided by section 11.

Payments  
discharge  
lien

**30.** Payments made in accordance with this Part operate as a discharge of the lien to the extent of the amount paid.

#### SECTION 30

This section is new. It makes it clear that payments made in accordance with this part of the Act discharge the liens on a dollar-for-dollar basis.

#### SECTION 31

How  
holdback  
not to be  
applied

**31.** Where the contractor or a subcontractor defaults in the performance of his contract or subcontract a holdback shall not be applied by any payer toward obtaining services or materials in substitution for those that were to have been supplied by the person in default, nor in payment or satisfaction of any claim against the person in default, until all liens which may be claimed against that holdback have expired, as provided in Part V, or have been satisfied or discharged.

This section is derived from section 11(9) of The Mechanics' Lien Act.

This section should be read in conjunction with section 79 [the right to enforce liens despite non-completion of contract by person to whom service is supplied]. It prevents the holdback, which represents part of the value of the services and materials already supplied, from being used to satisfy any claims related to the default until all claimants under the defaulting contract or subcontractor are paid or the time for preserving their liens has expired. Where the time for preserving liens has expired and no liens have been preserved, the holdback retained in respect of the defaulting contractor or subcontractor may then be used for set-off.

(9) Where the contractor or subcontractor makes default in completing his contract, the percentage required to be retained shall not, as against any lien claimant who by virtue of subsection 5 has a charge thereupon, be applied by the owner, contractor or subcontractor to the completion of the contract or for any other purpose nor to the payment of damages for the non-completion of the contract by the contractor or subcontractor nor in payment or satisfaction of any claim against the contractor or subcontractor.

## PART V

## EXPIRY, PRESERVATION AND PERFECTION OF LIENS

**32.**—(1) Unless preserved under this Part, a lien arising from services or materials supplied to an improvement,

- (a) under a subcontract that has been certified or declared to be completed, that has not earlier expired under clause *b*, expires at the conclusion of the sixty-day period after the day certified or declared to be the date the subcontract was completed;
- (b) on or before the day certified or declared to be the date of substantial performance of the contract, that has not earlier expired under clause *a* or *c*, expires at the conclusion of the sixty-day period after that day;
- (c) under a contract or subcontract that was abandoned, that has not earlier expired under clause *b*, expires at the conclusion of the sixty-day period after the contract or subcontract was abandoned; and
- (d) that has not earlier expired under clause *a*, *b* or *c*, expires at the conclusion of the sixty-day period after the contract was completed.

Expiry of  
unpreserved  
lien

Item

## SECTION 32

This section replaces section 21 of The Mechanics' Lien Act. However, the two sections are very dissimilar.

Under section 32 of the Draft, the same rules govern the preservation of liens arising from the supply of services or materials, or any combination of services or materials. Under section 32, a lien expires unless it is preserved within the time allowed for its preservation. A major anomaly that existed under The Mechanics' Lien Act is avoided in the draft. Under section 11 of The Mechanics' Lien Act, the holdback must be retained until after 37 days after the completion (or substantial performance) of the contract. However, the right to register a lien is governed by section 21 which provides a different period. As a consequence, the right to lien, in many cases, under the existing Act ends long before the holdback can properly be paid. Under the Draft the right to preserve a lien coincides with the requirement to retain a holdback. Both the period of the holdback and the expiry of liens are governed by section 32 of the Draft.

A number of rules are set out in section 32 specifying the relevant times for preservation of liens.

Subsection 2 of the Draft deals with the situation where a person supplies services or materials beginning before the contract is certified as substantially performed and continuing on after that date. In that case, the lien of the person is divided into two parts. The lien for the services or material supplied before the date of substantial performance of the contract expires 60 days after that date and the lien for services and materials supplied after that date continues to exist.

**21.**—(1) A claim for lien by a contractor or subcontractor in cases not otherwise provided for may be registered before or during the performance of the contract or of the subcontract or within thirty-seven days after the completion or abandonment of the contract or of the subcontract, as the case may be.

(2) A claim for lien for materials may be registered before or during the placing or furnishing thereof, or within thirty-seven days after the placing or furnishing of the last material so placed or furnished.

(3) A claim for lien for services may be registered at any time during the performance of the service or within thirty-seven days after the completion of the service.

(4) A claim for lien for wages may be registered at any time during the doing of the work for which the wages are claimed or within thirty-seven days after the last work was done for which the lien is claimed.

## SECTION 33

**33.—**(1) The following rules govern the certification and Rules governing certification of a contract:  
governing certification of a contract  
substantial performance of a contract

1. The payment certifier, or if there is no payment certifier, the owner and the contractor jointly shall determine whether a contract has been substantially performed, and where he or they so determine, shall certify the substantial performance of the contract.
2. The day on which the payment certifier or the owner and contractor jointly, as the case may be, reach a determination that the contract is substantially performed shall be the day set out in the certificate, and that day is deemed to be the day the contract was substantially performed.
3. Within seven days of the day of substantial performance, the person or persons who have certified it shall,
  - (a) give or send a copy of the certificate to the owner and the contractor and to any other person who, prior to the certification of substantial performance of the contract, personally served the person who has certified substantial performance with a request for a copy of the certificate; and
  - (b) post a copy of the certificate at the site office, where there is one, and where it is feasible to do so at each ordinary point of access to the job site.

4. Where there is a failure or refusal to certify substantial performance of the contract, any person may apply to the court, which, upon being satisfied that the contract is substantially performed, and upon such terms as to costs or otherwise as it considers fit, may declare that the contract has been substantially performed, and such declaration has the same force and effect as a certificate of substantial performance of the contract.

5. Unless the court otherwise orders, the day the declaration is made shall be deemed to be the day the contract was substantially performed.

This provision is new to the Draft.

The concept of substantial performance was incorporated into The Mechanics' Lien Act in the 1968-69 revisions upon the recommendation of the Ontario Law Reform Commission. It was intended to speed the release of holdbacks, particularly where large projects were involved. Prior to the adoption of substantial performance, the holdback was required to be retained until the actual completion of the work could be done on the contract. As a result, a trivial amount of work remaining to be done might delay the release of the holdback for a prolonged period. Obviously, this was a source of great hardship in many cases.

Unfortunately, the doctrine of substantial performance has not worked out as well as had been hoped. There have been two major reasons for this. First, the expiration of lien rights following substantial performance was uncertain. Second, there was a lack of a prescribed procedure for obtaining a conclusive date of substantial performance. The Draft attempts to remedy both these problems.

There are several key features of the procedure set out in subsection 1. First, it applies irrespective of whether there is a payment certifier. If there is no payment certifier, then the owner and contractor jointly are under an obligation to determine when the project has been substantially completed. If there is a failure or refusal to make such a determination, any person may apply to court to have this determination made. The Act requires notice of substantial performance to be provided for all who have requested it in writing and for notice to be posted on the job site. A certificate of substantial performance must contain the information which would be necessary to any person wishing to preserve a lien.



COMMENTS AND EXPLANATION

DRAFT CONSTRUCTION LIEN ACT

Section 33 (cont'd)

6. Every certificate or declaration made or given under this section shall contain,

- (a) the name and address of the owner and of the contractor;
- (b) the name and address of the payment certifier, where there is one;
- (c) a short description of the improvement;
- (d) the day the contract was determined or declared to be substantially performed;
- (e) where the lien attaches to the premises, a description of the premises sufficient for registration under *The Land Titles Act* or *The Registry Act*, as the case may be;
- (f) the street address, if any, of the premises.

R.S.O. 1970,  
c. 234, 409

Civil  
liability  
for failure  
to certify

(2) Any person who is required by this section to make a determination of the substantial performance of a contract, and who fails or refuses,

- (a) to certify the substantial performance of the contract even though there is no reasonable doubt that the contract has, in fact, been substantially performed; or
- (b) to give or send a copy of the certificate of the substantial performance of the contract to a person entitled to receive a copy of it,

is liable personally to anyone who suffers damage as a result.

Subsection 2 provides for the personal liability of any person required to certify but who fails to do so, where there is no reasonable doubt that the contract is substantially performed.

Rule governing  
certification  
of completion  
of subcontract

34.--(1) The following rules govern the certification and declaration of the completion of a subcontract:

1. The payment certifier, upon the request of the contractor, or if there is no payment certifier, the owner and the contractor jointly, shall determine whether a subcontract has been completed, and where he or they so determine, shall certify the completion of the subcontract.
2. The day on which the payment certifier or, where there is no payment certifier, the owner and contractor jointly, reach a determination that the subcontract is complete shall be set out in the certificate, and that day shall be deemed to be the day on which the subcontract was completed.
3. Within seven days of the completion of the subcontract, the person or persons who have certified it shall give or send a copy of the certificate to the subcontractor whose subcontract has been certified as complete, and to each person required to retain a holdback in respect of that subcontract.

4. Where there is a failure or refusal to certify completion of a subcontract, any interested person may apply to the court, which, upon being satisfied that the subcontract is complete and upon such terms as to costs or otherwise as it considers fit, may declare that the subcontract has been completed, and such declaration has the same force and effect as a certificate of the completion of the subcontract.

5. Unless the court otherwise orders, the day the declaration is made is deemed to be the day on which the subcontract was completed.

#### SECTION 34

This section replaces section 11(2), (3) and (4) of *The Mechanics' Lien Act*.

Section 34 sets out a more comprehensive procedure to determine the total completion of a subcontract than is presently contained in *The Mechanics' Lien Act*. The provisions of this section correspond to the provisions contained in section 33.

The section is intended to permit holdback funds retained in respect of a subcontract to be released after the time has expired for the preservation of liens arising under that subcontract. This is reasonable, in view of the fact that on major projects some subcontracts may be completed years before the substantial performance of the contract.

(2) Where a contract is under the supervision of an architect, engineer or other person upon whose certificate payments are to be made and thirty-seven days have elapsed after a certificate issued by that architect, engineer or other person to the effect that the subcontract has been completed to his satisfaction has been given to the person primarily liable upon that contract and to the person who became a subcontractor by a subcontract made directly under that contract, the amount to be retained by the person primarily liable upon that contract shall be reduced by 15 per cent of the subcontract price or, if there is no specific subcontract price, by 15 per cent of the actual value of the work done or materials placed or furnished under that subcontract, but this subsection does not operate if and so long as any lien derived under that subcontract is preserved by anything done under this Act.

(3) Where a certificate issued by an architect, engineer or other person to the effect that a subcontract by which a subcontractor became a subcontractor has been completed to the satisfaction of that architect, engineer or other person has been given to that subcontractor, then, for the purposes of subsections 1, 2 and 3 of section 21, section 23 and section 23a, that subcontract and any materials placed or furnished or to be placed or furnished thereunder and any work done or to be done thereunder shall, so far as concerns any lien thereunder of that subcontractor, be deemed to have been completed or placed or furnished not later than the time at which the certificate was so given.

(4) Where an architect, engineer or other person neglects or refuses to issue and deliver a certificate upon which payments are to be made under a contract or subcontract, the judge or officer having jurisdiction to try an action under this Act, upon application and upon being satisfied that the certificate should have been issued and delivered may, upon such terms and conditions as to costs and otherwise as he deems just, make an order that the work or materials to which the certificate would have related has been done or placed or furnished, as the case may be, and any such order has the same force and effect as if the certificate had been issued and delivered by the architect, engineer or other person.

## Section 34 (cont'd)

6. Every certificate or declaration made or given under this section shall contain,

- (a) the name and address of the owner and of the contractor;
- (b) the name and address of the payment certifier, where there is one;
- (c) a short description of the services or materials that were supplied under the subcontract;
- (d) the day on which the subcontract was determined or declared to be complete;
- (e) where the lien attaches to the premises, a description of the premises sufficient for registration under *The Land Titles Act* or *The Registry Act*, as the case may be; and
- (f) the street address, if any, of the premises.

(2) Any person who is required by this section to make a determination of the completion of a subcontract, and who fails or refuses, <sup>Civil Code, s. 409, 244</sup> <sup>to certify</sup>

(a) to certify the completion of the subcontract, even though there is no reasonable doubt that the subcontract has, in fact, been completed; or

(b) to give or send a copy of the certificate of completion to a person entitled to receive a copy of it,

is liable personally to anyone who suffers damage as a result.

(3) Where a subcontract is certified or declared complete, all services or materials supplied by any person in the completion of the subcontract are, for the purpose of clause a of subsection 1 of section 32 (expiry of unpreserved liens), supplied under the subcontract.

Subsection 2 provides for the personal liability of anyone who is required to determine whether a subcontract has been completed where that person fails, or refuses, to certify where there is no reasonable doubt that the subcontract has been completed.

Subsection 3 ensures that all lien rights arising under or by virtue of a subcontract expire at the same time. The time limit for expiration is governed by section 31(1)(a).

# DRAFT CONSTRUCTION LIEN ACT

## COMMENTS AND EXPLANATION

### EXISTING MECHANICS' LIEN ACT

The lien may be preserved

**35.**—(1) A lien may be preserved during the supplying of services or materials or at any time before it expires,

- (a) where the lien attaches to the premises by the registration in the proper land registry office of a claim for lien in claim for lien to the owner; and
- (b) where the lien does not attach to the premises, by giving to the owner notice of the claim for lien in accordance with this Part.

#### SECTION 35

Subsection 1 is derived from sections 16(1), 21a(2) and 22(1) of The Mechanics' Lien Act. There is one major difference between the Draft Act and The Mechanics' Lien Act provisions. It will no longer be possible to preserve a lien prior to the time when it arises. Under The Mechanics' Lien Act, it was possible to register a lien before the supply of materials or the doing of work. From a legal point of view, it is highly objectionable for a person to be permitted to preregister a right which he has yet to acquire. Furthermore, there is significant evidence that the right to preregister liens has led to a large number of highly inflated lien claims, to the general prejudice of everyone involved in a construction project. A person is entitled to recover the full value of the work which he has done in a lien action, even though he has registered a claim for less than that amount.

The special provision for the preservation of the lien against railroads in the existing Act has been deleted.

By virtue of clause (a) of subsection 1 of section 35, it will now be necessary to give notice of the claim for lien to the owner in order to preserve a lien. This is in addition to the requirement for registration of the claim. This requirement has been added because of the numerous occasions on which claims have been registered against the property and have been allowed to expire, without informing the owner of their registration. Such notice will enable an owner to obtain the discharge of the lien at the earliest opportunity.

**22.**—(1) Every lien for which a claim is not registered ceases to exist on the expiration of the time limited in section 21 for the registration thereof.

**21a (2)** Where the lien does not attach to the land by virtue of subsection 2 of section 5, any person who is claiming a lien shall give notice thereof in writing to the owner in the manner hereafter provided

**16 (3)** When it is desired to register a claim for lien against a railway, it is sufficient description of the land of the railway company to describe it as the land of the railway company, and every such claim shall be registered in the general register in the office for the registry division within which the lien is claimed to have arisen.



## Section 35 (cont'd)

Idem

(2) Where a claim for lien is in respect of a public street or highway owned by a municipality, the notice of claim for lien shall be given to the clerk of the municipality.

Idem

(3) Where a claim for lien is in respect of a public work, it shall be given to the Ministry or Crown agency for whom the improvement is done, or to such office as is prescribed by the regulations.

Contents of claim for lien

(4) Every claim for lien shall set out,

(a) the name and an address for service of the person claiming the lien and the name and address of the owner of the premises and of the person for whom the services or materials were supplied and the time within which the services or materials were supplied;

(b) a short description of the services or materials that were supplied;

(c) the price of the services or materials that were supplied;

(d) the amount claimed as owing; and

(e) a description of the premises,

(i) where the lien attaches to the premises, sufficient for registration under *The Land Titles Act* or *The Registry Act*, as the case may be, or

(ii) where the lien does not attach to the premises, the address or a description of the location of the premises.

R.S.O. 1970,  
c. 409, 234

Claim to be verified by affidavit

(5) Except as provided in subsection 6, a claim for lien shall be verified in duplicate by an affidavit of the person claiming the lien,

Subsections 2 and 3 are substantially similar to subsections 3 and 4 of section 21a of *The Mechanics' Lien Act*. These provisions are self-explanatory.

Subsection 4 is derived from and replaces section 16(1) of *The Mechanics' Lien Act*.

This provision has been amended in line with the restriction of preservation to those liens which have actually arisen. In addition, the reference to periods of credit has been deleted. Under *The Mechanics' Lien Act*, the time for the perfection of a lien, (see section 37) ran from the end of the period of credit, if this period was stated in the claim for lien. This rule so complicated proceedings that it seems better to abolish it.

Subsection 5 is substantially identical to section 16(2) of *The Mechanics' Lien Act*.

(3) Where the claim is in respect of a public street or highway owned by a municipality, the notice required to be given to the owner by subsection 2 shall be given to the clerk of the municipality.

(4) Where the claim is in respect of a public work, the notice required by subsection 2 to be given to the owner shall be given to the Ministry or Crown agency for whom the work is done or the materials are placed or furnished, or to such office as is prescribed by the regulations.

**16.—(1)** A claim for a lien may be registered in the proper registry office and shall set out,

(a) the name and an address for service of the person claiming the lien and of the owner or of the person whom the person claiming the lien, or his agent, believes to be the owner of the land, and of the person for whom the work was or is to be done, or the materials were or are to be placed or furnished, and the time within which the same was or was to be done or placed or furnished;

(b) a short description of the work done or to be done, or the materials placed or furnished or to be placed or furnished;

(c) the sum claimed as due or to become due;

(d) a description of the land as required by *The Land Titles Act* or *The Registry Act* and the regulations thereunder as the case may be; and

(e) the date of expiry of the period of credit if credit has been given.

(2) The claim shall be verified in duplicate by the affidavit of the person claiming the lien, or of his agent or assignee who has a personal knowledge of the matters required to be verified, and the affidavit of the agent or assignee shall state that he has such knowledge.

# DRAFT CONSTRUCTION LIEN ACT

## Section 35 (cont'd)

- (6) Where a claim for lien is made by a trustee of a worker's lien trust fund on behalf of the fund, the claim for lien shall be verified in duplicate by an affidavit and the claim may be for the amount that the trustee has reasonable and probable grounds to believe are owed to the fund and are recoverable by virtue of the lien and the affidavit shall state the sources of his information.
- (7) A general lien shall be preserved against each of the premises that the person having the lien desires the lien to continue to apply against and the claim against each premises may be for the price of services or material that have been supplied to all the premises.
- (8) Any number of persons having liens upon the same premises who may unite in a claim for lien but, where more than one lien is included in one claim, each person's lien shall be verified by affidavit as provided in subsections 5 and 6.  
or of an agent or assignee who has personal knowledge of the matters required to be verified, and the affidavit of the agent or assignee shall state that he has such knowledge.

**36.** In addition to any other ground on which he may be liable any person who preserves a claim for lien,

(a) for an amount grossly in excess of the amount which he is justly owed; or

(b) where he knows or ought to know that he does not have a lien,

is liable to any person who suffers damage as a result.

## COMMENTS AND EXPLANATION

Subsection 6 is a new provision. It has been added to facilitate the enforcement of lien claims by workers' trust funds. The more rigorous requirements of subsection 5 have often made it impossible to enforce such claims.

Subsection 7 is a new provision.

Subsection 8 is derived from section 17(1) of The Mechanics' Lien Act. The application of section 17(1) to general liens has been clarified in other provisions of the draft Act, and the reference to general liens in this section has been deleted.

## SECTION 36

This is a new section. This provision is designed to deter the filing of exaggerated lien claims. At present, the common law remedy of slander of title may be available in those cases where an exaggerated lien claim has been registered. However, it would appear that a statutory remedy is more desirable.

## EXISTING MECHANICS' LIEN ACT

**17.—(1)** A claim for lien may include claims against any number of properties, and any number of persons claiming liens upon the same property may unite therein, but, where more than one lien is included in one claim, each claim for lien shall be verified by affidavit as provided in section 16.

# DRAFT CONSTRUCTION LIEN ACT

3.7. — (1) A lien may not be perfected unless it is preserved.

(2) A lien that has been preserved expires unless perfected prior to the end of the period of sixty days next following the last day on which the lien could have been preserved.

Perfection of lien must first be preserved

(3) A person's preserved lien becomes perfected where,

Lien perfected

- (a) he commences an action to enforce his lien and,
  - (i) where the lien attaches to the premises, he registers in the proper land registry office a certificate of action in the prescribed form, or
  - (ii) where the lien does not attach to the premises he gives a copy of the certificate of action to the owner;
- (b) another lien on the premises is perfected in accordance with clause a between the time when he preserved his lien and the time when it would have expired under subsection 2.

General lien

- (4) A preserved general lien that attaches to the premises shall be perfected against each premises to which the person having the lien desires the lien to continue to apply.

## COMMENTS AND EXPLANATION

### SECTION 37

These provisions are derived from sections 22(2), 22(3), 23(1) and 23a of The Mechanics' Lien Act.

The only substantial change between the old provisions and the new is the clarification of the doctrine of sheltering. Under the principle of sheltering, a person's lien may be perfected by the perfection of another lien. The Court of Appeal has ruled that the commencement of an action to enforce a lien would perfect all liens which were in existence at the time when the certificate of action was registered, irrespective of whether those liens had also been registered. The confusion which this could cause is obvious. Subsection 1 and 3(b) of section 38 make it clear that sheltering may only be invoked to perfect preserved liens.

Subsection 4 sets out the requirement that a general lien must be perfected against each premise to which the lien is intended to continue to apply.

The procedure for the commencement and conduct of lien actions is set out in Part VIII of the Draft.

## EXISTING MECHANICS' LIEN ACT

22 (2) Upon an action under this Act being commenced, a certificate thereof shall be registered in the registry office in which the claim for lien is registered.

(3) Where a certificate of action has been registered for two years or more in the registry office and no appointment has been taken out for the trial of the action, the judge or, in the Judicial District of York, the master, may, upon the application *ex parte* of any interested person, make an order vacating the certificate of action and discharging all liens depending thereon.

23.—(1) Every lien for which a claim is registered ceases to exist on the expiration of ninety days after the work has been completed or the materials have been placed or furnished, or after the expiry of the period of credit, where such period is mentioned in the registered claim for lien, unless in the meantime an action is commenced to realize the claim or in which a subsisting claim may be realized, and a certificate is registered as provided by section 22.

23a. Every lien which by virtue of subsection 2 of section 5 does not attach to the land ceases to exist on the expiration of ninety days after,

- (a) the work has been completed or abandoned;
- (b) the materials have been placed or furnished; or
- (c) the expiry of the period of credit, where such period is mentioned in the notice referred to in section 21a,

unless in the meantime an action under this Act is commenced to realize the claim or in which a subsisting claim may be realized.

# DRAFT CONSTRUCTION LIEN ACT

## COMMENTS AND EXPLANATION

## EXISTING MECHANICS' LIEN ACT

Extent of perfected lien

**38.** A perfected lien expires if no appointment is made under section 62 for the trial of an action to enforce that lien or in which that lien may be enforced within two years of the date when that lien was perfected.

### SECTION 38

This section is derived from section 22 (3) of The Mechanics' Lien Act.

This provision gives a lien claimant 2 years from the time he has commenced his action to take out an appointment for the trial of the action. Unless this is done, the lien expires.

## PART VI

### RIGHT TO INFORMATION

Right to information on contract for tractor

**39.**—(1) Any person having a lien or who is the beneficiary of a trust under Part II may at any time by written request require the owner or the contractor to provide him with,

- (a) a copy of the contract for or in respect of which the services or materials were or are to be supplied, if the contract is in writing;
- (b) a statement of the terms of and parties to the contract, if the contract is not in writing;
- (c) the state of accounts between the owner and the contractor;
- (d) the name and address of the financial institution in which the joint trust account has been opened and,
  - (i) the account number,
  - (ii) the dates and amounts of any deposits into and disbursements from the account, and
  - (iii) the present balance of the account.

### SECTION 39

Subsection 1 is derived from section 28 of The Mechanics' Lien Act. Subsection 1 of the Draft is slightly broader than section 28 and encompasses information about the name and address of the financial institution in which a joint trust account has been opened.

The right to demand information has been extended to trust beneficiaries. The purpose of this extension is primarily to avoid the need to commence an action before the right to claim information exists.

**28.**—(1) Any lien claimant may in writing at any time demand of the owner or his agent the production, for inspection, of the contract or agreement with the contractor for or in respect of which the work was or is to be done or the materials were or are to be placed or furnished, if the contract or agreement is in writing or, if not in writing, the terms of the contract or agreement and the state of the accounts between the owner and the contractor, and, if the owner or his agent does not, at the time of the demand or within a reasonable time thereafter, produce the contract or agreement if in writing or, if not in writing, does not inform the person making the demand of the terms of the contract or agreement and the amount due and unpaid upon the contract or agreement or if he knowingly falsely states the terms of the contract or agreement or the amount due or unpaid thereon and if the person claiming the lien sustains loss by reason of the refusal or neglect or false statement, the owner is liable to him for the amount of the loss in an action therefor or in any action for the enforcement of a lien under this Act, and subsection 4 of section 38 applies.



## COMMENTS AND EXPLANATION

## Section 39 (cont'd)

(2) Any person having a lien or who is the beneficiary of a trust under Part II, including the owner or any mortgagee or unpaid vendor, may at any time by written request require the contractor or a subcontractor to provide him with,

(a) a copy of the subcontract between the contractor and the subcontractor or between one subcontractor and another subcontractor for or in respect of which the services or materials were or are to be supplied, if the subcontract is in writing;

(b) a statement of the terms of and parties to the subcontract, if the subcontract is not in writing;

(c) the state of accounts between the contractor and the subcontractor or between one subcontractor and another subcontractor.

(3) Any person having a lien or any beneficiary of a trust under Part II may at any time by written request require a mortgagee or unpaid vendor to provide him with,

(a) the terms of any mortgage on the premises or of an agreement for the purchase of the premises, in respect of which the services or materials were or are to be supplied;

(b) a statement showing the amount advanced under the mortgage or the amount owing under the agreement for the purchase.

(4) Where a person who under subsection 1, 2 or 3 is required to provide information does not at the time of a request, or within a reasonable time thereafter, produce and deliver such documents, statements and information or knowingly misstates the terms of any documents, statements or information, the person to whom the request was made is liable to the person making the request for damages sustained by him by reason of the refusal, neglect or misstatement in an action therefor, or in any action for the enforcement of a lien.

(5) The court may at any time, whether or not an action has been commenced, order a person upon whom a request for information has been made under this section to produce the information that can be requested and any other relevant documents.

Subsection 2 is new. It will permit an owner, mortgagee, or unpaid vendor and any other beneficiary of a trust to obtain information about subcontracts. Consequently, information may be obtained not only by those who are below, but also by those who are above the person from whom the information is sought in a construction permit. As the British Columbia Law Reform Commission has pointed out, a two-way street approach to access to information may, in many cases, improve the operation of the Act.

Subsection 3 is derived from section 28(2) of The Mechanics' Lien Act. The wording has been changed to make it clear that this information may be demanded prior to the commencement of an action or the preservation of a lien.

Subsection 4 is derived from parts of section 28(1) and (2) of The Mechanics' Lien Act. This provision gives a cause of action for the refusal, neglect to supply, or misstatement of, information against a person required to provide information.

Subsection 5 provides a court application to require the production of the information that can be demanded under subsections 1, 2 and 3 of the Draft. This provision is derived from section 28(3) of The Mechanics' Lien Act.

(2) Any lien claimant may in writing at any time demand of a mortgagee or unpaid vendor or his agent the terms of any mortgage on the land or of any agreement for the purchase of the land in respect of which the work was or is to be done or the materials were or are to be placed or furnished and a statement showing the amount advanced on the mortgage or the amount owing on the agreement, as the case may be, and, if the mortgagee or vendor or his agent fails to inform the lien claimant at the time of the demand or within a reasonable time thereafter of the terms of the mortgage or agreement and the amount advanced or owing thereon or if he knowingly falsely states the terms of the mortgage or agreement and the amount owing thereon and the lien claimant sustains loss by the refusal or neglect or misstatement, the mortgagee or vendor is liable to him for the amount of the loss in an action therefor or in any action for the enforcement of a lien under this Act, and subsection 4 of section 38 applies.

(3) The judge or, in the Judicial District of York, the master, may, on a summary application at any time before or after an action is commenced for the enforcement of the claim for lien, make an order requiring the owner or his agent or the mortgagee or his agent or the unpaid vendor or his agent or the contractor or his agent or the subcontractor or his agent, as the case may be, to produce and permit any lien claimant to inspect any such contract or agreement or mortgage or agreement for sale or the accounts or any other relevant document upon such terms as to costs as the judge or master considers just.

## SECTION 40

40.—(1) Any person who has verified a claim for lien that has been preserved is liable to be cross-examined on the claim for lien at any time prior to discovery irrespective of whether an action has been commenced.

(2) There shall be only one examination under subsection 1, but ~~item~~ every person named in the claim for lien is entitled to participate therein.

(3) Any person intending to examine a person under subsection 1 shall give at least two days notice of the examination specifying the time and place for the examination to,

(a) the person to be examined; and

(b) every other person named in the claim for the lien.

(4) The Supreme Court of Ontario Rules of Practice pertaining to examinations apply, with necessary modifications, to an examination under this section.

Verdict of  
of Rules

## PART VII

## DISCHARGE OF PRESERVED OR PERFECTED LIENS

41.—(1) A preserved lien may be discharged by the registration of a release in the prescribed form on the premises released.

Discharge of  
preserved  
by release

(2) A preserved general lien may be discharged against one or more of the premises which are subject to it by the registration in the proper land registry office of a release in the prescribed form on the premises released.

Discharge of  
preserved  
general lien

This provision is new to the Draft. The purpose of the section is to provide a means of verifying claims for lien. Until now, no such examination could take place until an action was commenced. It is widely believed that a right to cross-examine on any affidavit in support of a preserved lien would encourage the preservation of only honest claims.

Furthermore, it would also give the people named in the claim an opportunity to obtain more information about the claim which has been made. The procedural restrictions on this right to cross-examine — for example, only one such examination may be made — are to prevent abuse of this procedure.

## SECTION 41

This provision replaces section 25(1) of The Mechanics' Lien Act. The provision of the Draft provides for discharge by means of a release, rather than by means of a receipt acknowledging payment as is provided for in The Mechanics' Lien Act.

Subsection 1 provides for release of the usual type of preserved lien.

Subsection 2 provides for release of a preserved general lien which will discharge the lien against one or more of the premises against which it is registered.

25.—(1) A claim for lien may be discharged by the registration of a receipt acknowledging payment.

(a) where made by a lien claimant that is not a corporation, signed by the lien claimant or his agent duly authorized in writing and verified by affidavit; or

(b) where made by a lien claimant that is a corporation sealed with its corporate seal.

## Section 41 (cont'd)

Comments  
of HouseR.S.O. 1970,  
c. 409, 214

(3) A release under subsection 1 or 2 shall,

(a) identify the premises released sufficient for registration under *The Registry Act* or *The Land Titles Act*, as the case may be;

(b) identify the owner of the premises and the lien claimant;

(c) identify the claim for lien;

(d) state that the premises are released,

and shall be signed by the lien claimant, or sealed with its corporate seal in the case of a corporation, and except where the lien claimant is a corporation, shall be supported by an affidavit of execution.

Discharge  
of perfected  
lien

(4) Upon application, the court may permit the discharge of a perfected lien upon such terms as to the continuation of any action to enforce any other perfected lien as it considers appropriate in the circumstances.

## COMMENTS AND EXPLANATION

Subsection 3 deals with the requirements of a release.

Subsection 4 deals with the discharge of a perfected lien. Since other liens may "shelter" under a perfected lien, special provision must be made to deal with continuance of these sheltered liens when the other is discharged.

Power of  
Court to  
discharge lien;  
posting into  
court

**42.—(1)** Upon the application of any person for the discharge of a lien by payment into court, the court may allow the payment into court or the posting of security of an amount that the court determines to be reasonable in the circumstances to satisfy the liens of all persons having preserved or perfected liens on the premises at the time of the application.

#### SECTION 42

This section is derived from section 25(2) of The Mechanics' Lien Act.

The procedure and effect of an application for the discharge of lien by payment into a court is significantly changed in the Draft. The major change is that the payment into court, or the posting of security in an amount determined by the court, must result in a discharge of the lien or liens.

Another major change in section 42 is the requirement that the application to discharge a lien must be made on notice to all persons whose liens are to be discharged. At present, the application may be made without notice to the parties. The change has been made for the following reason:

Applications under this section may have a substantial effect upon the extent of recovery which the lien claimant whose lien is discharged may achieve. The lien claimant will be limited in his recovery to the amount paid into court. If the lien claimant has done additional work on the project, or has estimated the value of the work done incorrectly, the amount of his recovery may be less than the amount which he is owed. Providing notice to affected parties is not an unduly onerous burden on those who seek to make application under this section. However, it will provide the lien claimant with an opportunity to defend his interests. Where the lien claimant does not object to the payment into court, he may simply consent to the motion.

Subsection 1 permits the application to discharge a lien and permits the court to determine the amount that is reasonable in the circumstances to satisfy the liens of all persons having preserved or perfected liens.

(2) Upon application, the judge or, in the Judicial District of York, the master, may, at any time,

- (a) allow security for or payment into court of the amount of the claim of the lien claimant and the amount of the claims of any other subsisting lien claimants together with such costs as he may fix, and thereupon order that the registration of the claim for lien or liens and the registration of the certificate of action, if any, be vacated;
- (b) upon any other proper ground, order that the registration of the claim for lien or liens and the registration of the certificate of action, if any, be vacated; or
- (c) upon proper grounds, dismiss the action.



## Section 42 (cont'd)

(2) Where the application is to discharge a general lien against one or more of the premises subject to the lien, the court may apportion the general lien between each of the premises to be discharged and all of the premises subject to the lien that are not to be discharged.

(3) Upon the payment into court or the posting of security with the court, the court shall order the discharge of the liens and the vacation of any certificates of action in respect of them which have been registered against the premises.

(4) The court may at any time permit the amount paid into court or the security posted to be reduced, where a fit case is made out for doing so.

(5) Subject to subsection 8, where an order is made under subsection 3, the liens cease to exist as an interest in the premises and are a first charge on the payment into court or the security posted which takes the place of the premises and are subject to the claims of every person whose lien was discharged by the order to the same extent as if the payment into court or security posted with the court was realized by the sale of the premises in an action to enforce the liens.

(6) The persons whose liens were discharged by the order under subsection 3 may proceed with an action to enforce a claim against the money paid into court or the security posted with the court in accordance with the procedures set out in Part VIII, but no certificate of action shall be registered against the premises.

Subsection 2 permits the discharge of a general lien against one or more of the premises to which the lien applies and permits the court to apportion the lien against the premises to be discharged and those which are not to be discharged.

Subsection 3 requires the court to order the discharge of liens where the amount set by the court for the discharge has been paid into court or a bond has been posted with the court as security. This subsection should be read in conjunction with section 46 which provides that the discharged lien cannot be revived as an interest in the premises.

Subsection 4 allows the court to reduce the security where it is proper to do so, for example, where there has been payment to the person claiming a lien.

Subsection 5 replaces the lien as an interest in the premises with the lien as a first charge on the payment into court or the bond posted as security. This clears the owner's title so that further financing can be obtained for the project and gives the lien claimant priority over other creditors. Subsection 5 is subject to subsection 8 which ensures that all liens of the same class share rateably in the moneys available.

Subsection 6 provides that the lien action may proceed as an action to enforce a claim against the money or security posted but that no certificate of action can be registered against the premises.

## Section 42 (cont'd)

(7) Where more than one application is made under subsection 1 for the payment into court or posting of security to permit the discharge of liens with respect to the same improvement, the court may consolidate the applications and require that the payment into court or the security posted be adequate to satisfy all the liens which have been the subject of applications or make such other order as it considers just.

(8) Where a person whose lien was discharged under this section proceeds under subsection 6 to enforce a claim against the money paid into court or security posted, and judgment is given in his favour, the following rules apply:

1. Where the lien was discharged upon the posting of security, and the security is realized, any money recovered as a result of the realization of the security shall be paid into court.

2. Where the lien was discharged upon the posting of security, and the judgment may be satisfied without realizing the security, an amount sufficient to satisfy the judgment shall be paid into court.

3. No funds may be paid out of court except upon order of the court, which order may not be given,

(a) until the expiration of the period of thirty days next following the day on which judgment was entered; and

(b) unless the court is satisfied that there are no preserved or perfected liens existing against the premises.

4. Where no payment may be made out of court under paragraph 3 because there are preserved or perfected liens against the premises, the funds in court,

(a) shall be retained until the disposition of any proceedings to enforce those liens, or those liens have been discharged; and

(b) shall be applied in satisfaction of all liens, including those discharged under this section.

5. Where funds have been retained under paragraph 4, and the premises have been sold under Part VIII or IX in order to satisfy a lien, the proceeds of the sale shall be applied in satisfaction of all liens, including those discharged under this section.

Subsection 7 provides for the consolidation of several applications.

Subsection 8 provides that all lien claims will share rateably in the moneys available, regardless of when they were preserved and whether they have been removed from title.

COMMENTS AND EXPLANATION

Subsection 9 provides that the holdback may not be used as payment into court until the expiration of the time for the preservation of all liens which may be claimed against the holdback.

Subsection 10 requires that the application to discharge the liens must be made on notice to all persons whose liens are to be discharged, unless the applicant undertakes to make a payment into court, which may include security for costs if the court so orders.

Subsection 11 provides for repayment of excess money out of court.

SECTION 43

This section is substantially the same as section 25(5) of *The Mechanics' Lien Act*. It permits application to discharge a lien that has not been perfected within the time allowed for doing so. The application may be made without notice to the person who preserved his lien.

(5) Where the certificate required by section 22 or 23 has not been registered within the prescribed time and an application is made to vacate the registration of a claim for lien after the time for registration of the certificate, the order vacating the lien may be made *ex parte* upon production of a certificate of search under *The Land Titles Act* or of a registrar's abstract under *The Registry Act*, as the case may be, together with a certified copy of the registered claim for lien.

DRAFT CONSTRUCTION LIEN ACT

Section 42 (cont'd)

(9) No part of the holdback may be paid into court in order to obtain the discharge of a lien under this section until the expiration of the time for the preservation of all liens which may be claimed against the part of the holdback to be paid into court.

(10) An application under this section may not be made without notice to the person whose lien is to be discharged, unless the applicant undertakes to pay into court an amount equal to the amount claimed as owing in the claim for lien, plus any additional amount which the court may require as security for costs.

(11) Where it is found that the lien claimant is entitled to less than the amount which has been paid into court under this section in order to obtain the discharge of his lien, the balance of that amount shall be returned to the person who paid the money into court.

43. Where a lien preserved by registration has not been perfected within the time allowed for doing so, the court, upon the application of any person without notice to any other person, shall order the vacation of the claim for lien registered against the premises, upon production of,

- (a) a certificate of search under *The Land Titles Act*; or
- (b) a registrar's abstract under *The Registry Act*,

together with a certified copy of the preserved claim for lien.

Application  
must be  
perfected  
within  
time

R.S.O. 1970,  
c. 409, s. 44

Where  
notice  
is  
not  
given  
(as  
necessary)

When  
hold-  
back  
may  
be  
used  
as  
security

# DRAFT CONSTRUCTION LIEN ACT

## COMMENTS AND EXPLANATION

## EXISTING MECHANICS' LIEN ACT

44. Where a certificate of action has been registered against the premises for two years or more, and no appointment has been obtained for the trial of the action, the court, upon the application of any person, without notice to any other person, shall make an order vacating the certificate of action and discharging all liens depending thereon.

45. The court may order the discharge of a lien or the vacation of a certificate of action that has been registered against a premises upon any proper ground and subject to any terms and conditions that it considers appropriate in the circumstances.

This section is derived from section 25(2) (b) of The Mechanics' Lien Act.  
This section allows the court to discharge a lien or vacate a certificate of action where any proper grounds have been made out for this. This section allows the court to meet a number of unusual circumstances.

### SECTION 44

46.—(1) A discharge of a lien under this Part is irrevocable, and the discharged lien cannot be revived as an interest in the premises.

(2) An order discharging a claim for lien or vacating a certificate of action may be registered by registering in the proper land registry office a copy of the order certified under the seal of the court.

(3) An order discharging a claim for lien shall include a description of the land sufficient for registration under *The Land Titles Act* or *The Registry Act*, as the case may be, and a reference to the registration number of every affected preserved or perfected lien and certificate of action.

The question of whether a lien that has been discharged against premises can be revived has not been finally determined under *The Mechanics' Lien Act* in Ontario. In Nova Scotia this has been the rule. The revival of a discharged lien would create significant difficulties for landowners and for the registration of documents dealing with title to land. Subsection 1 provides that a discharged lien cannot be revived as an interest in the premises.

Subsection 2 permits registration of an order discharging a claim for lien or vacating a certificate of action.

Subsection 3 sets out the items which must be included in an order.

### SECTION 45

This section is derived from section 22(3) of *The Mechanics' Lien Act*. It permits the discharge of perfected liens where no appointment for trial has been taken out within two years.

### SECTION 46

This section is derived from section 25(2) (b) of *The Mechanics' Lien Act*.

This section allows the court to discharge a lien or vacate a certificate of action where any proper grounds have been made out for this. This section allows the court to meet a number of unusual circumstances.

(3) Where a certificate of action has been registered for two years or more in the registry office and no appointment has been taken out for the trial of the action, the judge or, in the Judicial District of York, the master, may, upon the application *ex parte* of any interested person, make an order vacating the certificate of action and discharging all liens depending thereon.

(2) Upon application, the judge or, in the Judicial District of York, the master, may, at any time,

(a) allow security for or payment into court of the amount of the claim of the lien claimant and the amount of the claims of any other subsisting lien claimants together with such costs as he may fix, and thereupon order that the registration of the claim for lien or liens and the registration of the certificate of action, if any, be vacated;

(b) upon any other proper ground, order that the registration of the claim for lien or liens and the registration of the certificate of action, if any, be vacated; or

(c) upon proper grounds, dismiss the action.



PART VIII

JURISDICTION AND PROCEDURE

**47.—**(1) A lien claim is enforceable in an action in the Supreme Court in accordance with the procedure set out in this Part. Where the claim is brought

(2) Any trust or other claim not joined with a lien claim or a trust or other claim severed from a lien claim is enforceable in a court of competent jurisdiction.

SECTION 47

This section is derived from section 29(1) of The Mechanics' Lien Act.

Subsection 2 is consequential to sections 56 and 57 of the Draft which provide for the joining of trust and other claims to a lien claim and the severance of those types of claims from a lien claim. The principle underlying those sections is that, where it is practical to do so, all claims relating to an improvement should be dealt with at one time. However, where the parties would be prejudiced by trying trust and other claims with the lien claim, or where the whole action would become unduly complicated, the court may sever the trust, or other claim, from the lien claim. Subsection 2 permits those claims to be brought in the court of competent jurisdiction, that is, the court that has monetary and territorial jurisdiction over that type of action.

**29.—**(1) A claim for lien is enforceable in an action in the Supreme Court.



## SECTION 49

**49.** A local judge of the court may exercise the jurisdiction of the Supreme Court under *The Trustee Act* in dealing with a trust arising under this Act.

This provision is new. Its purpose is to ensure that the jurisdiction of the Supreme Court, under *The Trustee Act*, may be exercised by the local judges of the Supreme Court. Unless this jurisdiction is specifically conferred by statute, the local judges would not have the power to deal with the trust provisions arising under this Act.

## SECTION 50

**50.**—(1) Except as provided in subsection 2,

(a) a master, where the premises or part thereof are situate in the Judicial District of York; and

This provision is new. It delineates the jurisdiction of the masters and local masters. By virtue of *The Judicature Act* and the rules thereunder, the master, at Toronto, has heard motions on Mechanics' Lien actions arising in all parts of the province. This has been both confusing and, in some cases, costly to the parties.

(b) a local master, where the premises or a part thereof are situate outside the Judicial District of York,

has jurisdiction to hear and dispose of any application under this Act, including applications where no action has been commenced, and all applications related to the conduct of an action or reference under this Act.

The jurisdiction given to the master, or local master, under this section is broad. However, subsection 2 deals with those matters, which for constitutional reasons, cannot be given to a master to determine.

(b) in the nature of or in respect to an appeal.

Subsection 3 is new. It clarifies the jurisdiction of the master where a reference is ordered under section 60. Where a master is hearing a reference, he enjoys all the powers of the court under section 51.

(3) In addition to his jurisdiction under subsection 1 and under *The Judicature Act*, a master or local master to whom a reference has been directed has all the jurisdiction, powers and authority of the court to try and completely dispose of the action and all matters and questions arising in connection with the action including the giving of leave to amend any pleading and the giving of directions to a receiver or trustee appointed by the court.

# DRAFT CONSTRUCTION LIEN ACT

## COMMENTS AND EXPLANATION

## EXISTING MECHANICS' LIEN ACT

51. The court trying an action shall take all steps as are necessary to enable it to dispose of the action and all matters related to it, completely, and may adjust the rights and liabilities of and give all necessary relief to all parties to the action.

### SECTION 51

This section replaces section 38(4) (a) and (b) of The Mechanics' Lien Act.

(4) The judge, or where a reference for trial is directed, the master,

(a) shall try the action, including any set-off and counterclaim, and all questions that arise therein or that are necessary to be tried in order to completely dispose of the action and to adjust the rights and liabilities of the persons appearing before him or upon whom notice of trial has been served;

(b) shall take all accounts, make all inquiries, give all directions and do all other things necessary to finally dispose of the action and of all matters, questions and accounts arising therein or at the trial, and to adjust the rights and liabilities of and give all necessary relief to all parties to the action and all persons who have been served with the notice of trial; and

52. A judge, local judge, master or local master of the court does not become seized of an action or reference by reason only of his appointing the time and place for the trial or reference.

### SECTION 52

This section is derived from section 38(9) of The Mechanics' Lien Act. Until a judge, local judge, master, or local master becomes seized of the case, any judicial officer who has jurisdiction may try the case.

(9) An action or reference under this Act may be tried by any judge or officer having jurisdiction to try the action or reference notwithstanding that the time and place for the trial or reference thereof were appointed and fixed by another judge or officer.



53. Except where otherwise provided in this Act, any power conferred on the court may be exercised by the court upon the application of any person.

SECTION 53

This provision is new. Its purpose is to make it clear that where the Act has no special provision as to who may apply for relief, any person may apply to the court for relief. However, where some other provision is made in the Act, the specific provision prevails. For example, only a party to the action may apply to the court for the appointment of a date for trial.

SECTION 54

This section replaces section 38(10) of The Mechanics' Lien Act. An application under this section may be brought at any time, irrespective of whether an action has been commenced. This power to apply to the court has been broadened from the existing Act.

54. Any person may apply to the court for directions as to Application pleadings, discovery, production or any other matter relating to directions an application, action or reference.

SECTION 55

This provision is substantially the same as section 29(2) of The Mechanics' Lien Act. A writ of summons is not required in a construction lien action.

55.—(1) An action shall be commenced by filing a statement of claim in the appropriate office of the court.

Subsection 2 is substantially similar to section 29(3) of The Mechanics' Lien Act. The time limit of 30 days is a departure from the normal time for delivery of a statement of claim under The Judicature Act, which is normally required to be served within 12 months of the time that the action is commenced by a writ.

(2) The statement of claim shall be served within thirty days after it is filed but the court may, on application made before or after the expiration of that period of time, extend the time for service.

Subsection 3 provides for commencing a counterclaim and a cross-claim in the statement of defence. A cross-claim, under this Act, is a claim against another defendant or against a third party.

(3) A cross-claim or counterclaim by any person shall be set out in his statement of defence.

(10) Any party to an action under this Act or any other interested person may at any time and from time to time apply to the judge having jurisdiction to try the action or, in the Judicial District of York, the master, for directions as to pleadings, discovery, production or any other matter relating to the action or reference, including the cross-examination of a lien claimant or his agent or assignee on his affidavit verifying the claim.

(2) An action under this section shall be commenced by filing a statement of claim in the office of the local registrar of the Supreme Court in the county or district in which the land or part thereof is situate.

(3) The statement of claim shall be served within thirty days after it is filed, but the judge having jurisdiction to try the action or, in the Judicial District of York, the master, may extend the time for service.

## COMMENTS AND EXPLANATION

## Section 55 (cont'd)

(4) Except as otherwise prescribed in this Act the pleadings in an action shall be as provided for in *The Judicature Act*, and the rules of practice and procedure thereunder.

Subsection 4 provides that all other pleadings are the same as they would be in an action under *The Judicature Act*.

## SECTION 56

Section 56 and 57 of the Draft take a new approach to lien actions. The basic principle underlying them is that all claims arising out of an improvement should be handled together, where it is practical to do so.

Subsection 1 explains how these actions may be joined together. The lien claimant may join these issues in a statement of claim.

All other parties who are dealt with as defendants in the Draft, may raise related claims by means of counterclaims, where the person against whom the claim is made is the person who named him as a defendant. Where the defendant is making a claim against any other person, it is made by way of cross-claim. Subsection 2 explains how a party is brought into the proceeding as a co-defendant. Under *The Construction Lien Act*, the liability of one person to another will depend upon the substantive rights of the parties rather than the procedure by which the person was made a party to the action. The third party procedure found in normal civil procedure will not exist under the Draft Act.

Subsection 3 makes it clear that a defendant may raise any legal or equitable defence to any of the claims which are made against him. Just as any number of claims may be brought against a defendant, the defendant may raise any number of defences. He is not confined merely to disputing the validity of the lien.

## DRAFT CONSTRUCTION LIEN ACT

36.—(1) Any claims arising from or related to an improvement may be joined with an action to enforce a lien,

- (a) by a lien claimant, in his statement of claim; or
- (b) by a defendant,

- (i) in a counterclaim against the person who named him as a defendant, or

- (ii) in a cross-claim against a co-defendant.

(2) A defendant named in a statement of claim, counterclaim or cross-claim may name any other person, even if that other person is not a party to the action, as a co-defendant by setting out the name of that person together with the claim against that person in his statement of defence, and by serving a copy of the statement of defence together with a copy of the statement of claim upon that person.

Defences

- (3) A defendant may raise any legal or equitable defence available to him.

COMMENTS AND EXPLANATION

DRAFT CONSTRUCTION LIEN ACT

SECTION 57

Subsection 1 permits the court to sever any trust claim, personal claim, counterclaim or cross-claim from an action where it is satisfied that the joinder of such claims would cause undue prejudice or would unduly complicate or prolong the conduct of the action. This section permits the court to deal flexibly with the various types of claim which may be brought together.

Subsection 2 is designed to preserve those trust claims which are brought within the limitation period, if they are severed from the main action after the limitation period has expired. This will not cause any substantial injustice, as all parties will be aware of the trust claim.

SECTION 58

Section 58 identifies the parties to a lien action, and explains how other persons may join into a lien action. It replaces sections 29(5) and 30 of The Mechanics' Lien Act.

(5) It is not necessary to make any lien claimants parties defendant to the action, but all lien claimants served with the notice of trial shall for all purposes be deemed to be parties to the action.

30. Any number of lien claimants claiming liens on the same land may join in an action, and an action brought by a lien claimant shall be deemed to be brought on behalf of himself and all other lien claimants.

Signature  
of claimant

Item

57.—(1) The court may order the severance of any trust claim, personal claim, counterclaim or cross-claim from an action where it is satisfied that the joinder of such claims with the action would,

- (a) cause undue prejudice to the other parties to the action or to the defendant named in the claim; or
- (b) would unduly complicate or prolong the conduct of the action.

(2) Where a trust claim under Part II that was joined with a lien claim was brought within the limitation period provided by section 14, any new action to enforce the trust claim is deemed to be brought within the limitation period provided by that section if it is brought within sixty days of the severance of that action under subsection 1.

Parties to  
action

Item

58.—(1) The person serving the notice of trial and all persons served with notice of trial are parties to the action.

(2) Any person with a perfected lien may join as a party to an action commenced prior to the perfection of his lien unless a date for trial of the action has been taken out for that action by filing with the court notice of his intention to join and by serving a copy of the notice on the owner, the person who commenced the action, and if some other person has carriage of the action, that other person.

(3) The court may at any time add or join any person as a party to the action.

Item

## SECTION 59

**59.**—(1) On application after defence or defence to a cross-claim or counterclaim, if any, has been delivered, or the time for such delivery has expired, a judge may refer to the master and a local judge to the local master, the whole action for trial under section 72 of *The Judicature Act*.

Reference  
of trial to  
master, etc.

R.S.O. 1970,  
c. 228

Idem

(2) At the trial, a judge may direct a reference to the master and a local judge may direct a reference to the local master, under section 71 or 72 of *The Judicature Act*.

Idem

(3) Where under subsection 1 the action has been referred to the master or local master for trial, any person who subsequently becomes a party to the action may, within seven days after becoming a party to the action apply to the judge or local judge of the court who directed the reference to set aside the judgment directing the reference.

(4) If no application is made under subsection 3 or where such application is refused, the person who subsequently became a party to the action is bound by the judgment directing the reference as if he had been a party to the action at the time the reference was directed.

**60.** The court may make an order awarding carriage of the action to any person who has a perfected lien.

## SECTION 60

This section is derived from, and is substantially the same as, section 37 of *The Mechanics' Lien Act*. It permits the court to award carriage of a *Mechanics' Lien* action to one of the parties.

## SECTION 61

This section is substantially similar to section 36 of *The Mechanics' Lien Act*. Lien actions are basically class action suits under the legislation. A second action should not be commenced but a plaintiff should join into the action already commenced. If, however, a second action is commenced, the court may consolidate the two actions and may award carriage of the proceedings to one of the parties.

**61.** Where more than one action is brought to enforce liens in respect of the same improvement, the court may consolidate all the actions into one action and in its discretion may award the carriage of the consolidated action to any person who has a perfected lien.

(2) In the Judicial District of York, the action shall be tried by a judge of the Supreme Court, but,

(a) on motion after defence or defence to counterclaim, if any, has been delivered or the time for such delivery has expired, a judge of the Supreme Court may refer the whole action to the master for trial pursuant to section 72 of *The Judicature Act*; or

(b) at the trial, a judge of the Supreme Court may direct a reference to the master pursuant to section 71 or 72 of *The Judicature Act*.

(3) Where on motion the whole action is referred to the master for trial, any person brought into the proceedings subsequent thereto and served with a notice of trial may apply to a judge of the Supreme Court to set aside the judgment directing the reference within seven days after service of notice of trial and, if such person fails to make such application, he is bound by such judgment as if he were originally a party thereto.

**37.** Any lien claimant entitled to the benefit of an action may at any time apply to the judge or officer having jurisdiction to try the action for the carriage of the proceedings, and the judge or officer may make an order awarding such lien claimant the carriage of the proceedings.

**36.** Where more actions than one are brought to realize liens in respect of the same land, the judge or officer having jurisdiction to try the action may, on the application of any party to any one of the actions or on the application of any other person interested, consolidate all such actions into one action and award the conduct of the consolidated action to any plaintiff as the judge or officer considers just



## SECTION 62

62.—(1) Any party may apply to the court without notice to Appointment for trial  
any other party at any time after,

(a) the delivery of the statement of defence, where the plaintiff's claim is disputed; or

(b) the expiry of the time for the delivery of the defence in all other cases,

to have a day fixed for the trial of the action and the court shall fix a date for trial.

(2) At least ten clear days before the date appointed for trial, the party who obtained the appointment shall serve a notice of trial upon any person who was on the eleventh clear day before the date appointed for trial,

(a) the owner;

(b) where the lien attaches to the premises, a person with a registered interest in the premises other than a preserved lien;

(c) where the lien attaches to the premises, an execution creditor of any person described in clause a or b;

(d) a person with a preserved lien on the premises; and

(e) identified as a person to whom services or materials were or were to be supplied in every claim for lien of every person with a preserved lien on the premises.

(3) Where a party names a person as a defendant in a cross-claim, he shall notify that person of the date appointed for trial as soon as he has notice of the date.

This section is derived from section 38(1), (2) and (3) of The Mechanics' Lien Act.

It provides a method for fixing a day for the trial of the action.

Subsection 2 provides for the giving of notice of trial to all persons with an interest in the action. The procedure requires that all persons who have an interest in the action be given notice of trial and for clarity the interests of these persons are set out.

Subsection 3 has been added to ensure that persons who have been added to an action in a cross-claim receive notice of the date appointed for trial.

38.—(1) After the delivery of the statement of defence where the plaintiff's claim is disputed, or after the time for delivery of defence in all other cases, either party may apply *ex parte* to a judge or officer having jurisdiction to try the action to fix a day for the trial thereof and the judge or officer shall appoint the time and place of trial, and the order, signed by the judge or officer, shall form part of the record of the proceedings.

(2) The party obtaining an appointment for the trial shall, at least ten clear days before the day appointed, serve notice of trial upon the solicitors for the defendants who appear by solicitors and upon the defendants who appear in person, and upon all the lienholders who have registered their claims as required by this Act or of whose claims he has notice, and upon all other persons having any charge, encumbrance or claim on the land subsequent in priority to the lien, who are not parties, and such service shall be personal unless otherwise directed by the judge or officer who may direct in what manner the notice of trial is to be served.

(3) Where any person interested in the land has been served with a statement of claim and makes default in delivering a statement of defence, he shall nevertheless be served with notice of trial and is entitled to defend on such terms as to costs and otherwise as the judge or officer having jurisdiction to try the action considers just.

COMMENTS AND EXPLANATION

DRAFT CONSTRUCTION LIEN ACT

Section 62 (cont'd)

Idem

(4) Where the lien does not attach to the premises, the party who obtained the appointment for trial may request the owner to inform him of the identity of every person described in clauses *d* and *e* of subsection 2, and where the owner fails to comply promptly, he shall be liable to any person who suffers damage that results from the failure to comply.

Subsection 4 establishes a procedure whereby the person who is required to serve a notice of trial may obtain the information he requires where the lien does not attach to the land. In these cases, the person cannot check the names of lien claimants and persons to whom services and materials were supplied from the documents filed in the Registry Office. The required information must be obtained from the Crown or from a municipality.

It should be noted that the right of a person with an interest in land to defend an action where he has defaulted in filing a statement of defence has not been included in the Draft. This is section 33(3) of The Mechanics' Lien Act. It is felt that the procedures established under the Draft are sufficient to inform all persons with an interest in the premises of claims and that these persons must file a defence in order to defend a claim against the premises. This approach is consistent with default judgment in other types of judicial procedures.

SECTION 63

This section provides a new procedure for settlement meetings. It embodies and gives statutory authority to a practice that has long existed in the Supreme Court.

63.—(1) At any time after a date has been fixed for trial of the action, the court, upon the application of the party having carriage of the action, may convene a settlement meeting for the purpose of resolving or narrowing the issues to be tried under the chairmanship of any person designated by the court.

Settlement meeting

(2) All parties are entitled to take part in the settlement meeting, and the court may make such orders as it considers fit in respect to the giving of notice of the settlement meeting to all parties.

Notice

COMMENTS AND EXPLANATION

DRAFT CONSTRUCTION LIEN ACT

Section 63 (cont'd)

(3) The chairman shall embody the results of the settlement meeting in a statement of settlement, which statement shall summarize,

(a) those issues of fact and law which have been settled by the parties; and

(b) those issues of fact and law which remain in dispute.

(4) The chairman shall file the statement of settlement with the court, and the statement shall be attached to and shall form part of the record and shall be binding upon the parties subject to any modification that the court considers necessary.

(5) Upon the filing of the statement with the court, the court may,

(a) if no defence has been filed to a claim for lien, declare the lien valid and give such further judgment as it considers appropriate;

(b) enter a judgment upon consent on those issues which have been settled by the parties;

(c) make such orders as are necessary in order to give effect to any judgment of the court under clause *a* or *b*.

(6) Rule 244 of the Rules of Practice and Procedure does not apply to an action under this Act.

The system of pretrial conferences provided for in Rule 244 would be totally unsatisfactory for an action under this Act.

Statement of settlement

Statement forms part of record

Powers of court

Non-application of Rule 244

# DRAFT CONSTRUCTION LIEN ACT

## COMMENTS AND EXPLANATION

## EXISTING MECHANICS' LIEN ACT

### SECTION 64

Judgment  
or  
report

64.—(1) The results of the trial shall be embodied,

(a) in a judgment, where the trial is conducted by a judge or local judge of the court; or

(b) in a report, where the trial is conducted by a master or local master of the court on a reference.

Subsections (1), (2), (4) and (5) are derived from section 38 of The Mechanics' Lien Act.

Subsection 3 is substantially the same as section 43(3) of The Mechanics' Lien Act. Subsection 6 is derived from Section 38(7) of The Mechanics' Lien Act.

The purpose of these provisions is to provide for the judgment of the court and for the confirmation of the report of the Master.

(2) The form of the judgment or report may be varied by the court in order to meet the circumstances of the case so as to afford to any party to the proceedings any right or remedy in the judgment or report to which he may be entitled.

(3) The report of a master or local master of the court shall be filed and shall be deemed to be confirmed at the expiration of the fifteen days from the date of service of notice of filing the report, unless a notice of appeal is served within that time.

(4) The judgment or report may direct any party found liable to make a payment, to make such payment forthwith, and execution may be issued therefor.

(a) immediately, in the case of a judgment; or

(b) after confirmation, in the case of a report.

38(4) The judge, or where a reference for trial is directed, the master,

(c) shall embody the results of the trial,

(i) in the case of a judge, in a judgment, and

(ii) in the case of a master, in a report,

which judgment or report may direct payment forthwith by the person or persons primarily liable to pay the amount of the claims and costs as ascertained by the judgment or report, and execution may be issued therefor forthwith in the case of a judgment and after confirmation thereof, in the case of a report.

(5) The form of the judgment or report may be varied by the judge or officer in order to meet the circumstances of the case so as to afford to any party to the proceedings any right or remedy in the judgment or report to which he may be entitled.

43 (3) Where an action is referred to the master for trial under subsection 2 of section 31, the report shall be filed and shall be deemed to be confirmed at the expiration of fifteen days from the date of service of notice of filing the same, unless notice of appeal is served within that time.



Section 64 (cont'd)

(5) The court may order that the premises be sold, and may direct the sale to take place at any time after the judgment or confirmation of the report, allowing, however, a reasonable time for advertising the sale.

(6) The court may allow any person with a perfected lien who <sup>Letting in</sup> was not served with a notice of trial and did not prove his claim at <sup>lien claimant</sup> the trial to be let in to prove his claim at any time before the <sup>after</sup> amount realized in the action for the satisfaction of the liens has <sup>judgment</sup> been distributed, and where his claim is allowed, the judgment or report shall be amended so as to include his claim.

Subsection 6 provides for the proving of claims by those lien claimants who were not before the court at the trial. It does not pertain to any lien claimant who has been served with a notice of trial and whose claim has been dismissed. The only valid reason for permitting a lien claimant to enter the proceedings under this section would be if he failed to obtain notice of the trial. For example, if his lien did not arise or become perfected or perfected until after the trial, he would not have received notice. Failure to permit him to prove his claim at this time would mean that he would be deprived of his rights.

SECTION 65

65. Where a person claiming a lien fails to prove his lien, the court may award him a personal judgment upon any ground disclosed by the evidence against any party to the action for such sum as may be due to him and which he might have recovered in an action against that party.

This section is derived from section 40 of The Mechanics' Lien Act. This section permits the court to award a personal judgment in favour of a lien claimant, even where the lien claimant has failed to prove the lien claim. Of course, the right to a personal judgment must be proven.

38 (6) The judge or officer may order that the estate or interest charged with the lien be sold, and may direct the sale to take place at any time after judgment or confirmation of the report, allowing, however, a reasonable time for advertising the sale.

(7) A lien claimant who did not prove his claim at the trial, on application to the judge or officer before whom the action or reference was tried, may be let in to prove his claim, on such terms as to costs and otherwise as are deemed just, at any time before the amount realized in the action for the satisfaction of liens has been distributed, and, where his claim is allowed, the judgment or report shall be amended so as to include his claim.

40. Where a lien claimant fails to establish a lien, he may nevertheless recover a personal judgment against any party to the action for such sum as may appear to be due to him and which he might recover in an action against such party.

**66.** Where a premises is sold under court order, or by a trustee appointed under Part IX, a person with a perfected lien is entitled to share in the proceeds of the sale in respect of the amount owing to him, although otherwise the amount or part thereof was not payable at the time of the commencement of the action or is not then payable.

This section is derived from section 41 of The Mechanics' Lien Act. A person may have a valid lien even though he may not be entitled to payment at the time when the action is commenced or terminated, because he has extended a very long period of credit. This section permits him to realize upon that lien.

#### SECTION 66

**67.** The court may make all orders necessary for the completion of a sale and for vesting the property in the purchaser.

This section is substantially the same as section 39(2) of The Mechanics' Lien Act. By virtue of this section, it is not necessary for all parties interested in the premises to join in the conveyance.

#### SECTION 67

**68.**—(1) Where a premises is sold under court order, or by a trustee appointed under Part IX, the proceeds of the sale shall be paid into court to the credit of the action.

This section is derived from section 39(1) of The Mechanics' Lien Act. Subsections 1 to 3 provide for dealing with the proceeds of sale. Subsection 4 deals with a situation where the proceeds of sale are insufficient to satisfy the judgment in costs.

#### SECTION 68

(2) The court may add to the claims of the party having carriage of the action his fees and actual disbursements in connection with the sale.

(3) The court shall direct to whom the proceeds shall be paid in accordance with the priorities established by this Act.

(4) Where the proceeds of the sale are insufficient to satisfy the judgment and costs, the court shall certify the amount of the deficiency and give personal judgment in the appropriate amount to each person whose judgment is not satisfied out of the proceeds against each person who has been found liable to him.

**41.** Where property subject to a lien is sold in an action to enforce a lien, every lienholder is entitled to share in the proceeds of the sale in respect of the amount then owing to him, although the same or part thereof was not payable at the time of the commencement of the action or is not then presently payable.

(2) The judge or officer before whom the action was tried may make all necessary orders for the completion of the sale and for vesting the property in the purchaser.

**39.**—(1) Where a sale is had, the moneys arising therefrom shall be paid into court to the credit of the action, and the judge or officer before whom the action was tried shall direct to whom the moneys in court shall be paid and may add to the claim of the person conducting the action his fees and actual disbursements incurred in connection with the sale, and, where sufficient to satisfy the judgment and costs is not realized from the sale, he shall certify the amount of the deficiency and the names of the persons who are entitled to recover the same, showing the amount that each is entitled to recover and the persons adjudged to pay the same, giving credit for payments made, if any, under subsection 4 of section 38, and the persons so entitled may enforce payment of the amounts so found to be due by execution or otherwise.

## COMMENTS AND EXPLANATION

## SECTION 69

This section is new. It is substantially identical to section 15 of The Statutory Powers Procedure Act. This section gives the court great discretion as to the evidence which it may admit and act upon. In situations where the evidence relates to construction projects, great latitude in admitting evidence is desirable.

## DRAFT CONSTRUCTION LIEN ACT

**69.**—(1) Subject to subsections 2 and 3, the court may admit as evidence in a trial or application, whether or not given or proven under oath or affirmation or admissible otherwise as evidence in a court.

(a) any oral testimony; and

(b) any document or other thing,

relevant to the subject-matter of the proceedings and may act on such evidence, but the court may exclude anything unduly repetitious.

(2) Nothing is admissible in evidence in a trial or application,

(a) that would be inadmissible by reason of any privilege under the law of evidence; or

(b) that is inadmissible under any statute.

(3) Nothing in subsection 1 overrides the provisions of any Act expressly limiting the extent to or purpose for which any oral testimony, documents or things may be admitted or used in evidence in any proceedings.

(4) Where the court is satisfied as to its authenticity, a copy of a document or other thing may be admitted as evidence in a trial or application.

(5) Where a document has been filed in evidence in a trial or application, the court may, or the person producing it or entitled to it may, with the leave of the court, cause the document to be photocopied and the court may authorize the photocopy to be filed in evidence in the place of the document filed and release the document filed, or may furnish to the person producing it or the person entitled to it a photocopy of the document filed certified by the court.

(6) A document purporting to be a copy of a document filed in evidence in a trial or application, certified to be a true copy thereof by the court, is admissible as evidence of the document.

What is  
admissible  
as evidence

What is  
inadmissible  
evidence

Nothing

Copies

Photocopies

Certified copy  
admissible  
as evidence

## COMMENTS AND EXPLANATION

## SECTION 70

**70.**—(1) The procedure shall be as far as possible of a summary character, having regard to the amount and nature of the summary liens in question.

(2) Interlocutory proceedings, other than those provided by this Act, shall not be taken without the consent of the court obtained upon proof that the proceedings are necessary or would expedite the resolution of the issues in dispute.

(3) The court may obtain the assistance of any merchant, accountant, actuary, building contractor, architect, engineer or other person in such a way as it considers fit, to enable it to determine better any matter of fact in question, and may fix the remuneration of such person and direct the payment thereof by any of the parties.

(4) Except where inconsistent with this Act, *The Indicture Act* and the Supreme Court of Ontario Rules of Practice apply to proceedings under this Act.

(5) A lien claimant whose claim does not exceed \$1,000 may be represented by an agent who is not a barrister and solicitor.

This section is substantially the same as section 46 of *The Mechanics' Lien Act*.

Even though the amounts in issue in a Mechanics' Lien action may be very significant, it is considered desirable to keep the application as summary as is possible. For claims of \$1000 or less, subsection 5 permits a lien claimant to be represented by a non-lawyer.

**46.**—(1) The object of this Act being to enforce liens at the least expense, the procedure shall be as far as possible of a summary character, having regard to the amount and nature of the liens in question.

(2) Except where otherwise provided by this Act, no interlocutory proceedings shall be permitted without the consent of the judge having jurisdiction to try the action or in the Judicial District of York, the master, and then only upon proper proof that such proceedings are necessary.

(3) The judge or officer having jurisdiction to try the action may obtain the assistance of any merchant, accountant, actuary, building contractor, architect, engineer or person in such way as he deems fit, the better to enable him to determine any matter of fact in question, and may fix the remuneration of any such person and direct payment thereof by any of the parties.

(4) Unless otherwise provided in this Act, the Rules of Practice and Procedure of the Supreme Court apply to proceedings under this Act.

38 (8) Any lien claimant for an amount not exceeding \$200 may be represented by an agent who is not a barrister and solicitor.



PART IX

EXTRAORDINARY REMEDIES

**71.**—(1) Where the lien attaches to the premises, any person who has a perfected lien may apply to the court for the appointment of a receiver of the rents and profits from the premises and the court may appoint a receiver upon such terms as to the giving of security or otherwise as it considers appropriate.

(2) All liens that are preserved or perfected shall be a charge upon any rents or profits recovered by the receiver.

SECTION 71

Subsection 1 is derived from section 34(1) of The Mechanics' Lien Act.

Subsection 2 is a new provision. Without the lien being a charge upon the rents or profits recovered by a receiver appointed under subsection 1, there is no point to the appointment of a receiver.

The appointment of a receiver of rents and profits is designed to give additional protection to those engaged in the building maintenance sector of the industry. Many of the other remedies provided by the Act are inappropriate to those who improve premises by maintenance service.

While the appointment of a Receiver may be made prior to the trial of the action, the court may also order the appointment of a Receiver as its final judgment, where this is the most appropriate means of satisfying the plaintiff's claim.

**34.**—(1) At any time after the delivery of the statement of claim, the judge having jurisdiction to try the action or, in the Judicial District of York, a judge of the Supreme Court, may, on the application of any lien claimant, mortgagee or other person interested, appoint a receiver of the rents and profits of the property against which the claim for lien is registered upon such terms and upon the giving of such security or without security as the judge considers just.

## SECTION 72

**72.**—(1) Where there is a preserved lien against premises, any person may apply to the court for the appointment of a trustee and the court may appoint a trustee upon such terms as to the giving of security or otherwise as it considers appropriate.

Powers of trustee

(2) A trustee appointed under subsection 1 has the power,

- (a) subject to the supervision and direction of the court, to manage, sell, mortgage or lease the premises; and
- (b) upon the approval of the court, to complete or partially complete the improvement.

Encumbrances

(3) Any premises to be sold may be offered for sale subject to any mortgage, charge, interest or other encumbrance if the court so directs.

Idem

(4) Except where the court directs that the sale be made subject to any mortgage, charge, interest or other encumbrance, any vesting order of the premises sold, made by a trustee, vests the title to the premises free from all encumbrances.

Auxiliary orders by court

(5) The court may make all orders necessary for the completion of any mortgage, lease or sale by a trustee under this section.

This section is derived from section 34(2)-(6) of The Mechanics' Lien Act. The section permits the appointment of a trustee to manage, sell, mortgage or lease the premises and to complete, or partially complete, the improvement.

(2) Any lien claimant, mortgagee or other person interested may make an application to the judge having jurisdiction to try the action or, in the Judicial District of York, a judge of the Supreme Court, at any time before or after judgment, who may hear *triva voce* or affidavit evidence or both and appoint, upon such terms and upon the giving of such security or without security as the judge considers just, a trustee or trustees with power to manage, mortgage, lease and sell, or manage, mortgage, lease or sell, the property against which the claim for lien is registered, and the exercise of such powers shall be under the supervision and direction of the court, and with power, when so directed by the court, to complete or partially complete the property, and, in the event that mortgage moneys are advanced to the trustee or trustees as the result of any of the powers conferred upon him or them under this subsection, such moneys take priority over every claim of lien existing as of the date of the appointment.

(3) Any property directed to be sold under subsection 2 may be offered for sale subject to any mortgage or other charge or encumbrance if the judge so directs.

(4) The proceeds of any sale made by a trustee or trustees under subsection 2 shall be paid into court and are subject to the claims of all lien claimants, mortgagees or other persons interested in the property so sold as their respective rights are determined, and, in so far as applicable, section 39 applies.

(5) The judge shall make all necessary orders for the completion of any mortgage, lease or sale authorized to be made under subsection 2.

(6) Any vesting order made of property sold by a trustee or trustees appointed under subsection 2 vests the title of the property free from all claims for liens, encumbrances and interests of any kind including dower, except in cases where sale is made subject to any mortgage, charge, encumbrance or interest as hereinbefore provided, but nothing in this section or elsewhere in this Act shall be deemed to extinguish the right to dower, if any, of any married woman or the right to have the value of her dower ascertained and deducted from the proceeds of the sale so paid into court.

35. At any time after delivery of the statement of claim and before judgment, or after judgment and pending the hearing and determination of any appeal, any lien claimant, mortgagee or other interested person may make an application to the judge having jurisdiction to try the action or who tried the action, as the case may be, or in the Judicial District of York, a judge of the Supreme Court, who may hear *in camera* or affidavit evidence or both and make an order for the preservation of any property pending the determination of the action and any appeal.

#### SECTION 73

This section is derived from section 35 of 'The Mechanics' Lien Act.

Subsection 2 is new and provides for an interim order to be made without notice. The purpose of this is to protect the property in cases calling for rapid action.

#### SECTION 74

It is common practice for owners, especially the Crown and municipalities, to obtain a bond from contractors guaranteeing that persons who supply services or materials to the contractor will be paid. Some contractors require a labour and material bond from their key subcontractors.

While the purpose of the bond is to protect the suppliers of services and materials, those suppliers cannot sue upon it, at common law, because they lack privity of contract. To remedy this problem, and to give them a right of action against the bonding company, statutory authority is required. This section permits suppliers to sue upon a labour and materials bond.

The Ontario Law Reform Commission recommended this approach in its Report on the Proposed Extension of Guarantor's Liability on Construction Bonds 1966.

73.—(1) Where the lien attaches to the premises, any person with a perfected lien may make an application to the court for an order for the preservation of the premises pending the determination of the action and any appeal, and the court may make the order where it is satisfied that the order is appropriate.

(2) The court may make a temporary order for the preservation of premises upon an application made without notice to other parties where it is satisfied that a temporary order is appropriate.

74.—(1) Where there is a labour and material payment bond in effect with respect to an improvement, any person whose payment is guaranteed under that bond, subject to the terms and conditions contained in the bond, has a right of action on his own behalf and on behalf of all other persons whose payment is guaranteed by that bond to recover the amount of the claim or claims against the surety named in the bond where the principal named in the bond defaults in any obligation with respect to payment to the claimant.

(2) In an action against a surety, the court may give judgment in favour of each person whose payment is guaranteed by the bond and all moneys recovered under the judgment shall be distributed rateably among the persons whose payment is guaranteed by the bond.

(3) Nothing in this section makes the surety liable for an amount in excess of the amount that he undertakes to pay under the bond and the surety's liability under the bond shall be reduced by and to the extent of any payment made in good faith by the surety either before or after judgment is obtained against the surety.

(4) The surety, upon satisfaction of its obligation to any person <sup>item</sup> whose payment is guaranteed by the bond, shall be subrogated to all rights of that person.

Court order preserving premises

Temporary order

Where labour and material payment bond in effect

Item

Item

PART X

APPEALS

**75.**—(1) If in the course of an action a question of law arises, statement of the court may state the question in the form of a stated case for the opinion of the Court of Appeal, and the stated case shall thereupon be set down to be heard before the Court of Appeal and notice of hearing shall be served by the party setting down the matter upon all parties concerned.

(2) The stated case shall set forth the facts material to the item determination of the question raised.

(3) A stated case under this section shall be heard by the Court of Appeal and not the Divisional Court, despite section 17 of *The Judicature Act*.

R.S.O. 1970,  
c. 228

**76.** An unconfirmed report made on a reference for trial may be appealed as prescribed by the rules of court to the judge or the local judge who directed the reference.

**77.**—(1) Subject to subsection 2, an appeal from a judgment or a confirmed report under this Act lies to the Court of Appeal.

(2) No appeal lies from,

(a) a judgment or a confirmed report under this Act, where the amount of the judgment or report is \$1,000 or less; or

(b) from an order made by the court on an interlocutory application.

(3) An appeal under this section shall be heard by the Court of Appeal and not the Divisional Court, despite section 17 of *The Judicature Act*.

R.S.O. 1970,  
c. 228

SECTION 75

This section is derived from section 42 of *The Mechanics' Lien Act*.

In view of the fact that appeals by stated case under the section will involve complicated questions of law, the stated case is directed to the Court of Appeal rather than the Divisional Court. This will give the highest court in the province the opportunity to resolve the uncertainty.

SECTION 76

This section replaces section 43 (2) of *The Mechanics' Lien Act* where a trial has been referred to a Master or Local Master by a judge, the appeal of the report is to the judge.

SECTION 77

This section replaces several provisions of *The Mechanics' Lien Act*. The major provisions being subsections 1 and 4 of section 43.

Subsections 1 and 3 require an appeal to go to the Court of Appeal.

Subsection 2 removes the right of appeal where the amount of the judgment is under \$1,000, or where there has been an order made by the court that does not dispose of the merits of the dispute. The purpose of these matters is to avoid frivolous or minor matters being appealed. From a practice viewpoint, it is unlikely that many appeals were ever brought where less than \$1,000 was an issue. Even a \$1,000 limit may be unrealistically low. Clause (b) codifies the existing law.

**42.**—(1) If in the course of proceedings to enforce a lien a question of law arises, the judge or officer trying the case may, at the request of any party, state the question in the form of a stated case for the opinion of the Court of Appeal, and the stated case shall thereupon be set down to be heard before the Court of Appeal and notice of hearing shall be served by the party setting down upon all parties concerned.

(2) The stated case shall set forth the facts material for the determination of the question raised, and all papers necessary for the hearing of the stated case by the Court of Appeal shall be transmitted to the registrar of the Supreme Court.

(2) Where a question is referred to the master for inquiry and report under subsection 2 of section 31, an appeal lies in the manner prescribed by the rules of court.

**43.**—(1) Except where the amount of a judgment or report made on a reference for trial in respect of a claim or counterclaim is \$200 or less, an appeal lies from any judgment or report under this Act to the Court of Appeal.

(4) An appeal from a judgment or report made on a reference for trial lies in like manner and to the same extent as from the decision of a judge trying an action in the Supreme Court without a jury.



## PART XI

## PRIORITIES

**78.** A person who has supplied services or materials in respect of an improvement may enforce his lien despite the non-completion or abandonment of the contract or a subcontract by any other person.

Enforcement of lien when default on contract, etc.

**79.** The rights of a person having a lien may be assigned by an instrument in writing and, if not assigned, upon his death pass to his personal representative.

Assignment of lien in writing or on death

**80.**—(1) Where one or more premises that are subject to an unpreserved general lien is sold, the general lien continues for the full amount of the lien against those premises that are subject to the lien which were not sold.

Continuation of unpreserved general lien

(2) Where a person having a preserved or perfected general lien releases the lien against one or more of the premises subject to the lien, the lien continues for the full amount of the lien against those premises which were not released.

Continuation of preserved or perfected general lien

## SECTION 78

This section is an exception to the general rule that an owner is not liable to the lien claimants for more than he owes the contractor. It permits a person who has supplied services or materials to an improvement to enforce his lien despite the fact that the person to whom he has supplied them has defaulted on his contract or subcontract. In such cases, liability to the person having a lien will be limited to the holdback where there is no money owing to the person in default.

## SECTION 79

This section is substantially the same as section 24 of *The Mechanics' Lien Act*. Lien rights are property rights and, therefore, may be assigned.

## SECTION 80

This is a new section, but is related to section 33 of *The Mechanics' Lien Act*.

A general lien should not be diminished by the sale of one of the premises to which it originally applied. While the sale or release of the premises will prevent the lien from being enforced against those premises, the lien claimant should still be entitled to enforce his general lien in its entirety against those premises which the owner has retained. For example, where a general lien exists for furnaces and their installation, the sale by the owner on a unit-by-unit basis should result in the supplier having a lien for the total amount remaining unpaid against all the units remaining unsold. Note that section 42(2) of the Draft governs apportionment of the lien against several premises.

**13.** Every subcontractor is entitled to enforce his lien notwithstanding the non-completion or abandonment of the contract by any contractor or subcontractor under whom he claims.

**24.** The rights of a lien claimant may be assigned by an instrument in writing and, if not assigned, upon his death pass to his personal representative.

**33.** Where an owner enters into an entire contract for the supply of materials to be used in several buildings, the person supplying the materials may ask to have his lien follow the form of the contract and that it be for an entire sum upon all the buildings, but, in case the owner has sold one or more of the buildings, the judge or officer trying the action has jurisdiction equitably to apportion against the respective buildings the amount included in the claim for lien under the entire contract.

**81.**—(1) The taking of any security for, or the acceptance of any promissory note or bill of exchange for, or the taking of any acknowledgment of the claim, or the giving of time for the payment thereof, or the taking of proceedings for the recovery, or the obtaining of a personal judgment for the claim, does not merge, waive, pay, satisfy, prejudice or destroy a lien unless the person having the lien agrees in writing that it has that effect.

(2) Where any such promissory note or bill of exchange has been negotiated, the person having the lien may still enforce it if he is the holder of the promissory note or bill of exchange at the time when he proves his claim.

(3) Nothing in this section extends the time for or dispenses with the requirement for the preservation or perfection of the lien.

**SECTION 81**

This section is derived from subsections 1, 2 and 3 of section 26 of The Mechanics' Lien Act.

Obtaining additional security does not prejudice the rights of the person having a lien. However, where the security takes the form of a mortgage or sale of the premises, is void against all other persons entitled to a lien on the premises by virtue of section 86(2).

**26.**—(1) The taking of any security for, or the acceptance of any promissory note or bill of exchange for, or the taking of any acknowledgment of the claim, or the giving of time for the payment thereof, or the taking of any proceedings for the recovery, or the recovery of any judgment for the claim, does not merge, waive, pay, satisfy, prejudice or destroy the lien unless the lien claimant agrees in writing that it has that effect.

(2) Where any such promissory note or bill of exchange has been negotiated, the lien claimant does not thereby lose his right to claim for lien if, at the time of bringing his action to enforce it or where an action is brought by another lien claimant, he is, at the time of proving his claim in the action, the holder of such promissory note or bill of exchange.

(3) Nothing in subsection 2 extends the time limited by this Act for bringing an action to enforce a claim for lien.

(4) A person who has extended the time for payment of a claim for which he has a claim for lien in order to obtain the benefit of this section shall commence an action to enforce the claim within the time prescribed by this Act and shall register a certificate as required by sections 22 and 23, but no further proceedings shall be taken in the action until the expiration of such extension of time.

**82.** Where a claim for lien is preserved by registration, the person having a lien shall be deemed to be a purchaser to the extent of the lien within the provisions of *The Registry Act* and *The Land Titles Act*, but, except as otherwise provided, those Acts do not apply to any lien arising under this Act.

**SECTION 82**

This section is substantially the same as section 20 of The Mechanics' Lien Act.

Until it is registered or notice in writing of a claim for lien is given to a purchaser or mortgagee, as a result of the operation of section 84, the purchaser or mortgagee will have priority over the interest of the lien claimant to the value of the sums advanced.

**20.** Where a claim is so registered, the person entitled to a lien shall be deemed to be a purchaser *pro tanto* and a purchaser within the provisions of *The Registry Act* and *The Land Titles Act*, but, except as herein otherwise provided, those Acts do not apply to any lien arising under this Act.

Priority of  
lien over  
other  
interests in  
the  
premises

**83.** A lien has priority over all unregistered interests in the premises and over all judgments, executions, assignments, attachments, garnishments and receiving orders, except those recovered, issued or made before the day on which the first lien in respect of the improvement arose.

#### SECTION 83

This section re-enacts a major portion of section 14(1) of The Mechanics' Lien Act.

It should be noted that the priority of the lien is only where those interests arise after the improvement has been commenced. This follows because in a sale to realize those interests the improvement would be part of the value of the premises recovered.

#### SECTION 84

**84.**—(1) Except as provided in subsections 2, 3 and 4, a lien has priority over all conveyances, agreements of sale or mortgages in respect of the premises.

Subsection 1 is new. By virtue of the provision, a lien will take priority over unregistered conveyances, agreements of purchase and sale, and mortgages of or on the premises. This question appears to be unsettled under The Mechanics' Lien Act.

**14.**—(1) The lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of the lien has been given to the person making such payments or after registration of a claim for the lien as hereinafter provided, and, in the absence of such notice in writing or the registration of a claim for lien, all such payments or advances have priority over any such lien.

## Section 84 (cont'd)

(2) An agreement of sale or mortgage in respect of the premises that was registered prior to the date when the first lien arose in respect of an improvement has priority over all liens arising in respect of the improvement. <sup>Exception</sup>

(a) to the extent of the actual value of the premises at the time when the first lien arose, for all sums advanced or secured against the premises prior to that time;

(b) to the extent of the amount of all future advances, unless prior to the time when the advance is made, a lien has been preserved or the person making the advance has received written notice of the lien.

(3) An agreement of sale, conveyance or mortgage that is in respect of the premises registered after the first lien arose in respect of an improvement has priority over all liens arising in respect of the improvement to the extent of all sums advanced on account of that agreement, conveyance or mortgage, unless, prior to the time when the advance was made, a lien was preserved or the person making the advance received written notice of the lien.

Subsections 2 and 3 correspond to sections 7(3), (5), (6) and section 14(1). It is hoped that the new provision is easier to read and comprehend than the sections which it replaces.

The mere fact that a purchaser or mortgagee is aware of work being done on the premises is not sufficient notice of the lien under the Act. The notice must be in writing. The purpose of the notice is to "stay the hand of the paymaster."

(5) Any mortgage existing as a valid security, notwithstanding that it is a prior mortgage within the meaning of subsection 3, may also secure future advances, subject to subsection 1 of section 14.

(6) A registered agreement for the sale and purchase of land and any moneys *bona fide* secured or payable thereunder has the same priority over a lien as is provided for a mortgage and mortgage moneys in subsections 3 and 5, and for the purposes of this Act the seller shall be deemed to be a mortgagee, and any moneys *bona fide* secured and payable under such agreement shall be deemed to be mortgage moneys *bona fide* secured or advanced.

14.—(1) The lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of the lien has been given to the person making such payments or after registration of a claim for the lien as hereinafter provided, and, in the absence of such notice in writing or the registration of a claim for lien, all such payments or advances have priority over any such lien.



Section 84 (cont'd)

(4) All sums advanced to a trustee appointed under Part IX as a <sup>lien</sup> result of any powers conferred upon him by that Part, take priority over every lien existing at the date of his appointment.

Subsection 4 is substantially identical to portions of section 34(2) of The Mechanics' Lien Act. Without this provision, it would be a practical impossibility for a trustee to obtain the financing necessary to complete an improvement. In many cases, completion of the improvement may be the best means of ensuring that all parties receive the maximum payment for the services and materials supplied.

**8.5.** All persons having a lien who have supplied services or materials to the same person in respect of an improvement comprise a class, and a person who has supplied services or materials to more than one person is a member of every class to the extent to which his lien relates to that class.

SECTION 85

This section is new, but reflects the existing decisions of the courts. As a result of the operation of section 18(2) of the Draft, the total value of the liens of all members of a class are limited to the sum owed in respect of the improvement to the payer of the class.

(2) Any lien claimant, mortgagee or other person interested may make an application to the judge having jurisdiction to try the action or, in the Judicial District of York, a judge of the Supreme Court, at any time before or after judgment, who may hear *ex parte* or affidavit evidence or both and appoint, upon such terms and upon the giving of such security or without security as the judge considers just, a trustee or trustees with power to manage, mortgage, lease and sell, or manage, mortgage, lease or sell, the property against which the claim for lien is registered, and the exercise of such powers shall be under the supervision and direction of the court, and with power, when so directed by the court, to complete or partially complete the property, and, in the event that mortgage moneys are advanced to the trustee or trustees as the result of any of the powers conferred upon him or them under this subsection, such moneys take priority over every claim of lien existing as of the date of the appointment.

**86.**—(1) Except where it is otherwise provided by this Act, <sup>Priority is preserved in the order in which claims are made against the premises and the materials.</sup> no person having a lien is entitled to any priority or preference over another member of the same class;

(b) the holdbacks and the proceeds of any sale of the premises shall be distributed rateably among the members of each class according to their respective rights; and

(c) the lien of every member of a class has priority over the lien of any person to whom the class supplied services or materials.

(2) Any conveyance or mortgage in respect of the premises <sup>Where the premises are sold or otherwise disposed of, the claimant's lien is not affected by the sale or disposal of the premises.</sup> given to any person entitled to a lien on the premises in payment of or as security for that claim, whether given before or after that lien arises, is void against all other persons entitled to a lien on the premises.

#### SECTION 86

This section replaces section 14(2) of The Mechanics' Lien Act.

Clause (a) and (b) of the section provide for equal distribution to all members of a class, that is, the persons who supply services and materials to the same payer. A major exception to this is the priority afforded to workers under section 87.

Clause (c) provides for payment of lien claimants in reverse contractual order. Those who are at the bottom of the construction pyramid are entitled to be paid before anyone else. Then those who are next above them, and so on, until the contractor receives his share.

Subsection 2 is derived from section 14(3) of The Mechanics' Lien Act. The Act would be self-defeating if it permitted one lien claimant to obtain priority over his fellows by arranging to obtain additional security in the form of a conveyance, mortgage or charge on the premises. Security for payment which is not on the premises improved is, of course, permitted.

(2) Except where it is otherwise provided by this Act, no person entitled to a lien on any property or money is entitled to any priority or preference over another person of the same class entitled to a lien on such property or money, and each class of lienholders ranks *pari passu* for their several amounts, and the proceeds of any sale shall be distributed among them *pro rata* according to their several classes and rights.

(3) Any conveyance, mortgage or charge of or on land given to any person entitled to a lien thereon under this Act in payment of or as security for any such claim, whether given before or after such lien claim has arisen, shall, as against other parties entitled to liens under this Act, on any such land be deemed to be fraudulent and void.

Workers' priority

**47.**—(1) The lien of a worker has priority over the lien of any other person belonging to the same class to the extent of the lesser of,

- (a) the value of thirty working days wages; and
- (b) the amount justly owing to the contractor or subcontractor,

and all such workers rank thereon on equal footing.

Workers' trust fund

(2) Where monetary supplementary benefits are payable to a worker's trust fund instead of to a worker, the trustee of the worker's fund is with respect to those benefits subrogated to the rights of the worker.

Devices to defeat priority claim

(3) Every device by an owner, contractor or subcontractor to defeat the priority given to workers by this section is void.

#### SECTION 87

Subsections 1 and 3 are derived from section 15(1) and (4) of The Mechanics' Lien Act. Subsection 2 is a new provision. The workers in any class of persons supplying services and materials to an improvement have priority over all other members of that class.

Subsection 2 is designed to meet a new development in the construction industry, that is, the development of trusts for workers' benefits. As has been noted earlier, the Draft permits the trustees of workers' trust funds to enforce the claims of workmen in respect to the portion of their wages which were payable to the fund. These funds are established for vacation pay, health and welfare benefits. Subsection 2 provides for the subrogation of the trust fund to the rights of the worker to the extent of the money owed to the fund. In effect, this means that the individual workers are disentitled from their lien right to the extent of the subrogation. The claim for the monies owed to the fund must be made by the trustees of that fund. This, of course, is the only practical way to provide for the protection of those trust funds.

It should be noted that the special procedural provisions for the enforcement of workers' liens for wages under The Mechanics' Lien Act have been deleted. Such summary proceedings would be entirely inappropriate for the large claims which are likely to be made by workers' trust funds. As for the claims of individual workers, they are usually able to recover the money which is owed to them by other, less difficult legal proceedings, for example, the summary remedies under The Master and Servant Act.

**15.**—(1) Every workman whose lien is for wages has priority to the extent of thirty days wages over all other liens derived through the same contractor or subcontractor to the extent of and on the 15 per cent directed to be retained by section 11 to which the contractor or subcontractor through whom the lien is derived is entitled, and all such workmen rank thereon *pari passu*.

(2) Every workman is entitled to enforce a lien in respect of any contract or subcontract that has not been completed and, notwithstanding anything to the contrary in this Act, may serve a notice of motion on the proper persons, returnable in four days after service thereof before the judge or officer having jurisdiction to try an action under this Act, that the applicant will on the return of the motion ask for judgment on his claim for lien, registered particulars of which shall accompany the notice of motion duly verified by affidavit.

(3) If the contract has not been completed when the lien is claimed by a workman, the percentage shall be calculated on the value of the work done or materials placed or furnished by the contractor or subcontractor by whom the workman is employed, having regard to the contract price, if any.

(4) Every device by an owner, contractor or subcontractor to defeat the priority given to a workman for his wages and every payment made for the purpose of defeating or impairing a lien are void.

**99.**—(1) All beneficiaries of the trust under Part II who have a lien have priority in the distribution of trust moneys over other beneficiaries of the trust.

(2) Priority in the distribution of trust moneys between beneficiaries who have liens shall be in accordance with the priorities set out in this Part.

#### SECTION 88

This section is new, but codifies the decisions of the courts. The provision is another exception to the rule that all persons supplying services and materials to the same payer share rateably. The preservation and perfection of lien claims requires diligence by a claimant. It is only fair that those who have taken care to protect their interests should have priority over those who have not taken such steps.

#### SECTION 89

This section replaces section 8 of The Mechanics' Lien Act. Section 8 applied only to fire insurance. The premises might be destroyed by any number of hazards. The new provision has been expanded to include the proceeds of any type of insurance.

#### SECTION 90

This new provision states expressly what is implicit in numerous other provisions of the Act.

#### SECTION 91

This section is new. It codifies existing practice which results from the incorporation by reference of section 39 of The Mechanics' Lien Act into section 34 of that Act.

**99.** Where any premises upon which a lien attaches is destroyed in whole or in part, all sums received by an owner or prior mortgagee by reason of any insurance on the premises shall take the place of the premises so destroyed and, after satisfying any mortgage or charge in the manner and to the extent set out in section 85, is subject to all liens to the same extent as if the sums had been obtained from a sale of the premises in an action.

**90.** Every device by a person and every payment made for the purposes of defeating or impairing a lien is void.

**91.** Where the premises are disposed of or encumbered under an order of the court or by a trustee appointed under Part IX, the proceeds shall be distributed in accordance with the priorities established by this Part.

**8.** Where any of the property upon which a lien attaches is wholly or partly destroyed by fire, any money received by reason of any insurance thereon by an owner or prior mortgagee or chargee shall take the place of the property so destroyed and is, after satisfying any prior mortgage or charge in the manner and to the extent set out in subsection 3 of section 7, subject to the claims of all persons for liens to the same extent as if the money had been realized by a sale of the property in an action to enforce the lien.

**39. - (1)** Where a sale is had, the moneys arising therefrom shall be paid into court to the credit of the action, and the judge or officer before whom the action was tried shall direct to whom the moneys in court shall be paid and may add to the claim of the person conducting the action his fees and actual disbursements incurred in connection with the sale, and, where sufficient to satisfy the judgment and costs is not realized from the sale, he shall certify the amount of the deficiency and the names of the persons who are entitled to recover the same, showing the amount that each is entitled to recover and the persons adjudged to pay the same, giving credit for payments made, if any, under subsection 4 of section 38, and the persons so entitled may enforce payment of the amounts so found to be due by execution or otherwise.



## PART XII

## RULES OF COURT

Costs

**92.**—(1) Subject to subsection 2, any order as to costs in an action, application or settlement meeting under this Act is in the discretion of the court and such order may be made against,

- (a) any party to the action or application; or
- (b) the solicitor or agent of any party to the action or application where the solicitor or agent has misconducted himself.

(2) Where the least expensive course is not taken by a party, the costs allowed to him shall not exceed what would have been incurred if the least expensive course had been taken.

(3) The costs of an appeal, except as provided by order of the court hearing the appeal, shall be upon the scale of costs allowed in county court appeals where the amount involved is within the proper competence of the county court, and, where it exceeds that amount, upon the Supreme Court scale.

## SECTION 92

This section replaces section 45 of The Mechanics' Lien Act. It is felt that the existing rigid cost rules sometimes lead to unfairness. It is hoped that the greater flexibility allowed to the court in determining proper costs will allow the court to avoid unfair results.

**45.**—(1) Subject to subsections 2, 3, 4 and 5, any order as to costs in an action under this Act is in the discretion of the judge or officer who tries the action.

(2) The costs of the action, exclusive of actual disbursements, awarded to the plaintiffs and successful lienholders, shall not exceed in the aggregate 25 per cent of the total amount found to have been actually due on the liens at the time of the registration thereof, and shall be apportioned and borne in such proportion as the judge or officer who tries the action may direct, but in making the apportionment he shall have regard to the actual services rendered by or on behalf of the parties respectively, provided that, where a counterclaim is set up by a defendant, the amount and apportionment of the costs in respect thereof are in the discretion of the judge or officer who tries the action.

(3) Where costs are awarded against the plaintiff or other persons claiming liens, they shall not exceed, except in the case of a counterclaim, 25 per cent of the claim of the plaintiff and the other claimants, besides actual disbursements, and shall be apportioned and borne as the judge or officer who tries the action may direct.

(4) Where the least expensive course is not taken by a plaintiff, the costs allowed to him shall in no case exceed what would have been incurred if the least expensive course had been taken.

(5) Where a lien is discharged or vacated under section 25 or where judgment is given in favour of or against a claim for a lien, in addition to the costs of the action, the judge or officer who tries the action may allow a reasonable amount for the costs of drawing and registering the claim for lien or of vacating the registration thereof, but this does not apply where the claimant fails to establish a valid lien.

**43**(5) The costs of an appeal shall not be governed by subsections 2 and 3 of section 45 but, subject to any order of the Court of Appeal, shall be upon the scale of costs allowed in county court appeals where the amount involved is within the proper competence of the county court, and, where it exceeds that amount, upon the Supreme Court scale.

## DRAFT CONSTRUCTION LIEN ACT

## COMMENTS AND EXPLANATION

## EXISTING MECHANICS' LIEN ACT

## SECTION 93

**93.**—(1) Subject to subsection 3 and except where otherwise ordered by the court, all documents required to be given under this Act are sufficiently given if given personally to the intended recipient or if sent by registered mail addressed to the intended recipient at,

- (a) his address for service, if there is one; or
  - (b) the last known mailing address of the intended recipient according to the records of the person sending the document, where there is no address for service.
- (2) A document given to the intended recipient by registered mail shall, in the absence of evidence to the contrary, be deemed to have been given on the fifth day, excluding Saturdays and holidays, following the date on which it was mailed.

(3) Except where otherwise ordered by the court, the following documents shall not be sent by registered mail,

- (a) a statement of claim;
  - (b) a notice of trial;
  - (c) a request to be informed of the substantial performance of the contract; and
  - (d) a notice under section 20.
- (4) Where a document is sent by registered mail, the date appearing on the postal registration receipt shall be deemed conclusively to be the date of mailing.

Section 93 replaces section 47 of The Mechanics' Lien Act. It attempts to clear up certain questions that have arisen about the giving of documents under the Act.

**47.** Except where otherwise directed by the judge having jurisdiction to try the action or, in the Judicial District of York, the master, all documents relating to an action under this Act, other than statements of claim and notices of trial, are sufficiently served upon the intended recipient if sent by registered mail addressed to the intended recipient at his address for service.

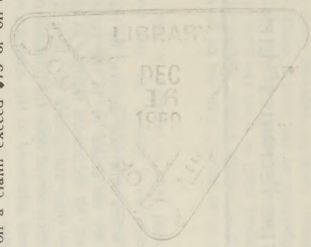
**49.** The Lieutenant Governor in Council may make regulations,

- (a) prescribing forms and providing for their use;
- (b) providing for and requiring the posting of notices on building sites;
- (c) prescribing the appropriate offices of the Crown to which notice of a claim for lien must be sent.

**44.** The fee payable by every plaintiff, every plaintiff by counterclaim and every lien claimant, including every person recovering a personal judgment, in any action to realize a lien under this Act is,

- (a) \$5 on a claim or counterclaim not exceeding \$500;
- (b) \$10 on a claim or counterclaim exceeding \$500 but not exceeding \$1,000;
- (c) \$10 on a claim or counterclaim exceeding \$1,000, plus \$1 for every \$1,000 or fraction thereof in excess of \$1,000.

but no fee is payable on a claim for wages only; and in no case shall the fee on a claim exceed \$75 or on a counterclaim exceed \$25.



SECTION 94

Clauses (a), (b) and (c) are a verbatim re-enactment of section 49 of *The Mechanics' Lien Act*. Clause (d) replaces section 44 of that Act.

SECTION 95

This provides for the repeal of *The Mechanics' Lien Act* legislation.

SECTION 96

This section deals with transitional matters.

**94.** The Lieutenant Governor in Council may make regulations,

- (a) prescribing forms and providing for their use;
- (b) providing for and requiring the posting of notices on building sites;
- (c) prescribing the appropriate offices of the Crown to which claims for lien must be sent;
- (d) prescribing fees payable by the parties to an action.

**95.** The following are repealed:

- 1. *The Mechanics' Lien Act*, being chapter 267 of the Revised Statutes of Ontario, 1970.
- 2. *The Mechanics' Lien Amendment Act, 1975*, being chapter 43.

**96.**—(1) This Act comes into force on the 1st day of January, 1982 and applies to all contracts entered into on or after that date and to the subcontracts arising under those contracts.

(2) Despite section 96, the Acts mentioned therein continue to apply to all contracts entered into before the 1st day of January, 1981, and to the subcontracts arising under those contracts.

**97.** The short title of this Act is *The Construction Lien Act, 1981*.

Repeals

Commence-  
ment

Idem

Short title







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